

ARTICLES
JUDICIALLY MANAGEABLE STANDARDS AND
CONSTITUTIONAL MEANING

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JUDICIALLY MANAGEABLE STANDARDS AND CONSTITUTIONAL MEANING

Richard H. Fallon, Jr.*

The Supreme Court has long held that disputes that do not lend themselves to resolution under “judicially manageable standards” present nonjusticiable political questions. Filling several gaps in the literature, this Article begins by exploring what the Court means by judicial manageability. Professor Fallon identifies a series of criteria that anchor the Court’s analysis, but he also argues that in determining that no proposed test for implementing a constitutional guarantee is judicially manageable, the Court must often make an ultimate, all-things-considered assessment of whether the costs of allowing adjudication to proceed would exceed the benefits. This determination is so discretionary, Professor Fallon argues, that if the requirement of judicial manageability applied to the Court’s own decisionmaking process (as it does not), the criteria by which the Court identifies judicially unmanageable standards might themselves be disqualified as judicially unmanageable.

Although the demand for judicially manageable standards is most prominent in the political question doctrine, Professor Fallon argues that the concern to develop judicially manageable tests pervades constitutional adjudication. Until glossed by judicially formulated tests, most constitutional provisions would not pass muster as judicially manageable standards. Moreover, some of the tests that courts adopt largely for reasons of judicial manageability underenforce, whereas others overenforce, the underlying constitutional guarantees. Linking the phenomena of constitutional underenforcement and overenforcement to the demand for judicially manageable standards, Professor Fallon propounds “the permissible disparity thesis” that there can be acceptable gaps between the Constitution’s meaning and the doctrinal tests applied by courts. He then deploys the permissible disparity thesis to cast new light on the nature and significance of both constitutional theories and constitutional rights, many of which should be viewed as partly aspirational, not necessarily requiring full immediate enforcement.

According to entrenched Supreme Court precedent, disputes that do not lend themselves to resolution under judicially manageable standards present nonjusticiable political questions. A plurality of the Justices most recently enforced this stricture in *Vieth v. Jubelirer*,¹ a case involving an equal protection challenge to a partisan gerrymander of Pennsylvania’s congressional voting districts. After adjudging an array of possible tests too vague to qualify as judicially manageable, Justice Scalia’s plurality opinion pronounced categorically that “politi-

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¹ 124 S. Ct. 1769 (2004).

cal gerrymandering claims are nonjusticiable.”² Four dissenting Justices engaged the plurality on its own terms. They assumed that if the Court could not identify judicially manageable standards, the political question doctrine would apply, but they pointed to specific tests under which they thought the Court should resolve the case.³

Among the things that might be said about the branch of the political question doctrine that demands judicially manageable standards, one deserves emphasis at the outset: perhaps more than any other constitutional doctrine, this one recognizes explicitly that a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other.⁴ As I shall take pains to establish, disparities between constitutional meaning and judicial doctrine arise frequently in constitutional adjudication as the result of the demand for judicially manageable standards. Nowhere else, however, do courts acknowledge the gap quite so explicitly. Writing for the *Vieth* plurality, Justice Scalia assumed that “an excessive injection of politics [into the design of electoral districts] is unlawful”⁵ under the Equal Protection Clause, but he maintained nonetheless that courts could not adjudicate partisan gerrymandering claims.

The Supreme Court’s insistence that federal courts may not enforce the Constitution in the absence of judicially manageable standards raises a multitude of questions. First, what exactly does the Court mean when it refers to judicially manageable standards? What criteria does it employ to gauge manageability? Second, to what extent does the existence or nonexistence of judicially manageable standards reflect the Constitution’s text and history and to what extent the compe-

² *Id.* at 1778 (plurality opinion).

³ Justice Stevens proposed a test under which the Court would “ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.” *Id.* at 1812 (Stevens, J., dissenting). Justice Souter, joined by Justice Ginsburg, developed a five-element test for establishing a prima facie case of vote dilution, under which a plaintiff would need to show membership in a “cohesive political group” that “would normally be a major party,” a district created with “little or no heed to . . . traditional districting principles,” correlations between the line-drawing anomalies and the distribution of a political group, a hypothetical alternative district that would better comport with traditional principles and alleviate the group-based disadvantage, and a legislative intent to disadvantage the group that was adversely affected. *See id.* at 1817–19 (Souter, J., dissenting). Finally, Justice Breyer called for an inquiry into whether a districting scheme created an “unjustified entrenchment” of one party in contravention of “basic democratic norms,” exemplified by “a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power.” *Id.* at 1825 (Breyer, J., dissenting).

⁴ *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978).

⁵ *Vieth*, 124 S. Ct. at 1785 (plurality opinion) (emphasis omitted). For Justice Scalia, the assumption may have been only an assumption. *Cf.* *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95–97 (1990) (Scalia, J., dissenting) (defending patronage-based hiring and firing practices as constitutionally permissible largely because of their “landmark” historical status).

tence and imagination of judges? When Justice Scalia pronounced *Vieth* nonjusticiable because “no judicially discernible and manageable standards for adjudicating political gerrymandering claims *have emerged*,”⁶ did he identify a flaw in the Constitution, which failed to achieve clarity on a crucial point, or did he acknowledge a judicial failure (including his own) to devise manageable standards?⁷

Third, what is the role of judicially manageable standards in cases not subject to the political question doctrine? If a case is justiciable, judicially manageable standards presumably exist, but how precisely do or must those standards mirror the Constitution’s meaning? Can the demand for judicially manageable standards introduce a disparity between constitutional meaning and judicial rules of decision in cases that the courts decide on the merits, or only in political question cases?

In pursuing these and related questions, this Article has two major aims. The first, which responds to a gap in the literature, is to analyze the idea of judicially manageable standards. My explorations begin with the political question doctrine, in which the Supreme Court has made the demand for judicially manageable standards most explicit, but ultimately press more broadly and deeply into constitutional law.⁸ If federal courts cannot enforce the Constitution in the absence of judicially manageable standards, then such standards must exist in all cases that uphold constitutional claims. It is therefore crucial to grasp what judicially manageable standards are and to understand the processes by which the Court identifies or devises them.

Judicially manageable standards, I argue, are far more often the products or outputs of constitutional adjudication than inherent elements of the Constitution’s meaning. In other words, the Supreme Court typically frames or devises the tests or standards that it then assesses for judicial manageability. Within a practice in which courts routinely fashion doctrinal tests to implement vague constitutional language, *Vieth* represents an instructively anomalous judicial failure to formulate a manageable standard under which litigation could occur. By examining cases in which courts throw up their hands and

⁶ *Vieth*, 124 S. Ct. at 1778 (plurality opinion) (emphasis added).

⁷ Justice Scalia emphasized that courts had been attempting to formulate judicially manageable standards for the identification of unconstitutional political gerrymanders for at least eighteen years, since *Davis v. Bandemer*, 478 U.S. 109 (1986), ruled such claims to be justiciable. See *Vieth*, 124 S. Ct. at 1777–78 (plurality opinion). Three Justices had been prepared to rule political gerrymandering claims nonjusticiable in *Davis* itself. See *Davis*, 478 U.S. at 144–45, 147–48 (O’Connor, J., concurring in the judgment) (arguing that the Equal Protection Clause provides no judicially manageable standards to resolve political gerrymandering claims).

⁸ Cf. *Baker v. Carr*, 369 U.S. 186, 337 (1962) (Harlan, J., dissenting) (“The suggestion . . . that courts lack standards by which to decide cases such as this, is relevant not only to the question of ‘justiciability,’ but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case.”).

conclude that no judicially manageable standard is available, we can learn much about judicial practice in the more typical cases in which judicially devised formulae implicitly pass muster as judicially manageable.

In crafting rules of decision with the demand for judicial manageability in mind, as in appraising tests devised by others, judges and Justices take guidance from a number of analytic criteria. Among my aims in this Article is to tease out those criteria from the Supreme Court's opinions. Often, however, after all of the analytical work has occurred, a question will remain whether a particular proposed standard *sufficiently* meets the applicable criteria to qualify as judicially manageable. In making this ultimate judgment, the Court, willy-nilly, conducts a startlingly open-ended inquiry in which, among other things, it weighs the costs and benefits of adjudicating pursuant to particular proposed standards. To put the point provocatively, the Court makes its judgments about whether proposed standards count as judicially manageable under criteria that would themselves fail to qualify as judicially manageable if the requirement of judicial manageability applied (as, for reasons that I explain, it does not).

Because the demand for judicially manageable standards stands partly distinct from the search for constitutional meaning,⁹ it is not uncommon for judicially prescribed tests either to underenforce or to overenforce the constitutional norms that they reflect. The broader phenomena of constitutional over- and especially underenforcement provide an illuminating perspective on the political question doctrine. Within a constitutional practice in which the courts must recurrently devise tests to implement constitutional norms, the total judicial nonenforcement of a constitutional guarantee under the political question doctrine is less anomalous than appearances might suggest. It is simply the limiting case of underenforcement of the Constitution through doctrines that fail to enforce the full meaning of particular constitutional provisions.

My second major aim in this Article is to use the notion of judicially manageable standards, and especially of judicial nonenforcement or underenforcement of constitutional guarantees for reasons involving judicial manageability, as a window onto some broader issues of constitutional law and theory. The refusal of courts to enforce constitutional guarantees due to the absence of judicially manageable standards provides the foundation for what I shall term "the permissible

⁹ The effort to draw distinctions between the Constitution's meaning, on the one hand, and the tests, doctrines, or decision rules used by the courts to decide constitutional cases, on the other hand, has grown increasingly common in the literature of constitutional theory, as I discuss *infra* section II.A, pp. 1297–1306. For a useful survey, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

disparity thesis," which holds that it is sometimes acceptable for courts to allow a gap to open between the Constitution's meaning and the doctrines through which judges implement constitutional guarantees. Once the possibility of permissible disparities is acknowledged, vital questions arise about the grounds on which such disparities can be justified. In a preliminary exploration, I argue that many prominent theories of constitutional interpretation offer accounts of what the Constitution means, but not of how courts should necessarily decide constitutional cases.

The stare decisis effect of judicial precedents that were wrongly decided in the first instance exemplifies the importance of this distinction.¹⁰ Although such precedents almost by definition depart from the Constitution's meaning, nearly all jurists and constitutional theorists accept that courts should frequently follow even erroneous past decisions. When and why courts should do so are questions that a full theory of constitutional adjudication would address but that many theories of constitutional meaning simply ignore.

With questions about permissible disparities between constitutional meaning and implementing doctrines spotlighted for attention, I argue that we should think of the Constitution as a partly aspirational document, embodying ideals that are not yet and perhaps need not ever be fully realized but that remain constitutional ideals nonetheless. I also discuss adjustments in our thinking about constitutional rights that acknowledgment of a partly aspirational Constitution would entail and offer suggestions about when courts should leave constitutional aspirations temporarily unfulfilled.

The Article unfolds as follows. Part I examines the branch of the political question doctrine involving judicially manageable standards. This Part probes the relationship between constitutional norms and the standards that courts devise to implement those norms. It also examines the criteria by which the Supreme Court measures judicial manageability. Part II explores ways in which the demand for judicially manageable standards influences the Supreme Court's formulation of doctrines in myriad areas and sometimes produces either underenforcement or overenforcement of otherwise vague constitutional guarantees. Part III responds to pragmatists' objections to distinguish-

¹⁰ See, e.g., Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 n.8 (2000) ("The essence of the doctrine . . . is adherence to earlier decisions . . . even though the court in the subsequent case otherwise would be prepared to say, based on other interpretive criteria, that the precedent decision's interpretation of law is wrong." (emphasis omitted)); see also Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989) (discussing "constraint by incorrectly decided precedents" (emphasis omitted)); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987) ("[I]f we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.").

ing between constitutional meaning and the judicially manageable standards that courts apply to enforce that meaning. Part IV then explores implications of the permissible disparity thesis for the ways in which we should think about constitutional theories, the nature of constitutional rights, and the proper role of courts in constitutional adjudication.

I. JUDICIALLY MANAGEABLE STANDARDS AND THE POLITICAL QUESTION DOCTRINE

The political question doctrine that divided the Supreme Court in *Vieth v. Jubelirer* is a partial curiosity. Commentators disagree about the doctrine's nature.¹¹ Some question whether it should exist at all.¹² There can be no disagreement, however, that the Supreme Court applies the political question label from time to time and that it sometimes cites an absence of judicially manageable standards as a reason for doing so. A now-canonical statement of relevant criteria came in *Baker v. Carr*:¹³

Prominent on the surface of any case held to involve a political question is found 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 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.¹⁴

Despite its settled status, the branch of the political question doctrine involving judicially manageable standards has seldom received close examination. Among the questions to be asked are these: What is the relationship between judicial manageability and constitutional meaning in determinations that categories of cases are nonjusticiable? What role do courts play in crafting and identifying the standards that

¹¹ The disagreement is unsurprising in light of "the odd amalgam of constitutional, functional, and prudential factors that have been used by the courts in determining whether a case presents a nonjusticiable political question." Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 244 (2002). For a survey of issues arising under the political question doctrine and of related scholarship, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 244-67 (5th ed. 2003).

¹² See, e.g., Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622-23 (1976) (arguing that the doctrine is "an unnecessary, deceptive packaging of several established doctrines"); Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1045-55 (1985) (arguing that the doctrine is not normatively defensible).

¹³ 369 U.S. 186 (1962).

¹⁴ *Id.* at 217.

are then judged manageable or unmanageable? And by what criteria are judicially manageable and unmanageable standards identified?

A. Constitutional Meaning, Judicially Manageable Standards, and the Judicial Role

So far as I am aware, the Supreme Court has never attempted to define what it means by judicially manageable standards nor to specify what role courts should perform in developing them. A few hints emerge from *Vieth*, however. Although the Justices could muster no consensus concerning the proper result, they appeared to agree on a number of central premises about the structure of constitutional law and about the judicial role in producing constitutional doctrine.

First, all of the Justices recognized at least a potential distinction between constitutional norms and the judicial tests through which constitutional norms are enforced.¹⁵ With respect to the former, the Justices unanimously assumed that the Equal Protection Clause forbids partisan gerrymanders that excessively disadvantage a political party,¹⁶ but they also agreed that the existence of a prohibitory norm did not suffice to make partisan gerrymandering claims justiciable. The demand for judicially manageable standards states a further constitutional requirement. “The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy,” Justice Scalia wrote in the plurality opinion.¹⁷

Second, the need for judicially manageable standards that are distinct from an underlying constitutional norm arises when the norm itself fails the requirement of judicial manageability.¹⁸ The constitutional provision that no person “shall . . . be eligible to [the] Office [of President] who shall not have attained to the Age of thirty five Years”¹⁹ presumably constitutes a judicially manageable standard all by itself. By contrast, none of the Justices in *Vieth* thought that the bare language of the Equal Protection Clause sufficed.

¹⁵ This distinction is implicit in the Justices’ unanimous acknowledgment that there might be no judicially manageable standards permitting courts to identify when partisan gerrymanders violate an assumed constitutional norm barring gerrymanders that go too far and, more particularly, in the efforts of the various opinions to devise or identify judicially manageable standards. Justice Kennedy was perhaps most explicit, distinguishing what he called the “Fourteenth Amendment standard” from a “subsidiary” and judicially manageable standard that more determinately specified how the “Fourteenth Amendment standard” should be applied. *See Vieth v. Jubelirer*, 124 S. Ct. 1769, 1797 (2004) (Kennedy, J., concurring in the judgment).

¹⁶ *See id.* at 1785 (plurality opinion).

¹⁷ *Id.*

¹⁸ *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 395–96 (1990) (acknowledging the need for courts to develop judicially manageable standards to implement otherwise vague or indeterminate constitutional provisions).

¹⁹ U.S. CONST. art. II, § 1, cl. 5.

Third, in cases in which constitutional norms are not themselves judicially manageable standards, courts properly seek to devise such standards. Though this point is only implicit in *Vieth*, the Justices again appear unanimous in their view. In separate dissenting opinions, Justices Stevens, Souter, and Breyer all endeavored to craft tests that would satisfy the requirement of judicial manageability.²⁰ Justice Stevens sought to extract a manageable standard from prior cases,²¹ but he did not suggest that his preferred formula came directly from the Constitution, from the original understanding of the Equal Protection Clause, or from any other likely candidate to supply the Constitution's normative meaning. Justice Souter wrote explicitly about the judicial role in fashioning a constitutional test. The challenge, he said, was to "translate" constitutional norms of fairness into "workable criteria."²² Believing that the courts had not so far met that challenge with regard to partisan gerrymanders, he proposed to "start anew" by developing a complex, five-part test analogous to one that the Supreme Court had "crafted" for employment discrimination cases.²³ He described his goal as "devising" a workable test,²⁴ not finding one in the Constitution. In a separate opinion, Justice Breyer made similarly creative efforts to formulate a manageable standard.²⁵

Strikingly, Justice Scalia's plurality opinion mounted no criticism of the dissenting Justices' assumption that it was the role of judges, when possible, to devise workable standards to implement constitutional norms. Instead, Justice Scalia argued that the dissenters had failed to meet their own goal: they had not succeeded in fashioning standards that deserved to count as judicially manageable.²⁶ Indeed, Justice Scalia himself has maintained that judges should strive to craft clear rules to implement otherwise vague constitutional norms and thus to limit judicial discretion in future cases.²⁷

The *Vieth* dissenters' efforts to formulate judicially manageable standards reveal an important, little-noted ambiguity in the term. In one usage, references to judicially manageable standards describe an

²⁰ See *supra* note 3.

²¹ *Vieth*, 124 S. Ct. at 1810 (Stevens, J., dissenting) ("The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process.")

²² *Id.* at 1815 (Souter, J., dissenting).

²³ *Id.* at 1817 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

²⁴ *Id.*

²⁵ See *id.* at 1827–29 (Breyer, J., dissenting) (seeking to identify "indicia of abuse" of legislative power to draw district lines).

²⁶ See *id.* at 1784–92 (plurality opinion).

²⁷ Cf. *Morrison v. Olson*, 487 U.S. 654, 711–12 (1988) (Scalia, J., dissenting) (criticizing the majority for adopting a standard that "might be called the unfettered wisdom of a majority of this Court"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989).

input to constitutional decisionmaking. Viewed as an input in light of which a court might be asked to resolve constitutional cases, the bare language of the Equal Protection Clause is not a judicially manageable standard in political gerrymandering disputes. In another usage, however, judicially manageable standards are not so much inputs as the *outputs* of constitutional adjudication. A judicially manageable standard is an output, rather than an input, in any case in which a court successfully devises a test that can thereafter be used to implement a constitutional provision that is not itself a judicially manageable standard.

Fourth, and in some ways most interestingly, the Justices participating in *Vieth* all appeared to assume that a judicially manageable standard — if one could be devised — need not replicate the Constitution’s meaning precisely. The point here is a subtle one that can be illuminated by imagining alternative processes by which courts might produce judicially manageable output standards. One is a process of “specification,” pursuant to which the mid-level generalities or implementing standards that emerge from adjudication perfectly express — by stating in more precise, context-specific terms — the meaning of the constitutional norm in question.²⁸ Another is a process of “implementation,” through which judges devise formulations that reflect the underlying norms but also respond to further practical considerations, including ease of administrability.²⁹ Examination of the opinions in *Vieth* suggests that the dissenting Justices were all engaged in a search for practically workable formulations — as the term judicially manageable standards might tend to connote — not restricted to the specification of constitutional norms.

The approach of the *Vieth* dissenters was in no way aberrant.³⁰ As Justice Scalia has acknowledged, if a constitutional norm is vague, then any relatively determinate reformulation is likely to introduce at least “mild substantive distortion.”³¹ Fred Schauer has made a similar point.³² In his terminology, crisply applicable rules are “entrenched generalizations” that are invariably overinclusive, underinclusive, or

²⁸ Cf. Henry S. Richardson, *Specifying Norms as a Way To Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFF. 279, 290–300 (1990) (developing a model in which the commitments that underlie a general norm are honored through precise elaborations that neither modify nor create exceptions to the norm itself).

²⁹ See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37–42 (2001) (identifying a judicial function of implementation distinct from interpretation).

³⁰ See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 837 (2005) (“All that can be demanded, in the context of partisan gerrymandering as elsewhere, is a judicially manageable test for sensibly administering the constitutionally discernible standard.”).

³¹ Scalia, *supra* note 27, at 1178.

³² See FREDERICK SCHAUER, PLAYING BY THE RULES 78 (1991).

both when measured against their background justifications.³³ Often, however, “mild substantive distortion” is a small price for the benefits of a clear rule.³⁴ So assuming, Justice Scalia’s plurality opinion in *Vieth* canvassed at least six proposed tests for implementing the Equal Protection Clause’s prohibition of political gerrymanders that go “too far.”³⁵ He rejected only one on the ground that it strayed unacceptably from the Constitution’s meaning.³⁶ Different though the others were, their sole identified defect lay in their lack of judicial manageability.

Fifth, any judicially manageable standard that emerges as an output of the judicial process may not diverge too far from the meaning of the constitutional guarantee that it implements. Although close enough is good enough, too much disparity will not do, as the *Vieth* plurality made clear in its rejection of the test for forbidden partisan gerrymanders that Justice Stevens advocated.³⁷ In essence, Justice Stevens proposed using the same test to mark forbidden partisan gerrymanders that the Court employs to define constitutionally impermissible race-based gerrymanders.³⁸ It would be difficult to dismiss that test as judicially unmanageable. If it is judicially manageable when applied to race-based gerrymanders, it should presumably also be judicially manageable as applied to partisan gerrymanders.³⁹ Instead, the plurality opinion rebuffed Justice Stevens’s proposal on the ground that the Constitution tolerates more partisan influences than it does

³³ *Id.*

³⁴ *See* Scalia, *supra* note 27, at 1178. According to Justice Scalia, clear rules promote the equal treatment of like cases, enhance predictability, foster judicial restraint by limiting judges’ discretion, and encourage judicial steadfastness by providing judges a “solid shield” when they resist popular pressures. *See id.* at 1178–80.

³⁵ *See* *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1778–89 (2004) (plurality opinion).

³⁶ *See id.* at 1785–86 (rejecting a standard proposed by Justice Stevens); *see also id.* at 1782 (rejecting a standard proposed by the appellants as judicially unmanageable but noting that “we question whether it is judicially discernible in the sense of being relevant to some constitutional violation”).

³⁷ *See id.* at 1785–86.

³⁸ *See id.* at 1810 (Stevens, J., dissenting) (“In my view, the same standards [that apply to racial gerrymandering claims] should apply to claims of political gerrymandering, for the essence of a gerrymander is the same regardless of whether the group is identified as political or racial.”); *id.* at 1812 (“I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.”).

³⁹ *See id.* at 1803 (“Notably, the plurality does not argue that the judicially manageable standards that have been used to adjudicate racial gerrymandering claims would not be equally manageable in political gerrymandering cases.”). To be sure, some qualification is needed. It is possible that the test might be determinate enough to be politically acceptable in the one context but not the other or that it would likely be applied consistently in the one context but not the other. *See infra* sections I.B.2(b)–(c), pp. 1287–90. In *Vieth*, however, Justice Scalia did not raise a context-based objection of this kind.

race-based motivations in the design of electoral districts.⁴⁰ “This Court may not willy-nilly apply standards — even manageable standards — having no relation to constitutional harms,” Justice Scalia wrote.⁴¹

B. Gauging Judicial Manageability and Unmanageability

In discussing the judicial role in crafting judicially manageable standards, I have not yet addressed the most obvious questions: What does it mean for a standard to be judicially manageable? What criteria does the Supreme Court use in making this determination?⁴² A survey of the Court’s opinions, especially but not exclusively in *Vieth*, suggests that the operative considerations occupy three categories. One states a threshold requirement of intelligibility. A test that was unintelligible would not be judicially manageable. A second category subsumes a number of practical desiderata that all may be satisfied to greater or lesser degrees. Assessment of the criteria in this category will frequently leave a question of sufficiency: are some or all of the practical desiderata adequately realized for a test to count as judicially manageable? The third category comprises values by reference to which the Court answers the question of sufficiency and determines whether, all things considered, to permit adjudication pursuant to a particular standard. The moral and practical values within this third category have received no clear statement. In *Vieth*, the plurality appears to have conducted a relatively open-ended cost-benefit analysis in which it considered, among other factors, the public acceptability of judicial intervention into partisan gerrymandering disputes.

1. *Intelligibility*. — For a standard to count as judicially manageable, the most basic requirement is intelligibility, or “capability of being understood.”⁴³ Although the conceptual point seems indisputable, disagreement sometimes exists about which judicial standards are intelligible. Tests that make constitutionality turn on legislative intent

⁴⁰ See *Vieth*, 124 S. Ct. at 1785–86 (plurality opinion) (arguing that the strict scrutiny appropriately triggered by racial gerrymanders would be inappropriate for political gerrymanders).

⁴¹ *Id.* at 1786.

⁴² For the most part, the Court’s concern with judicial manageability appears to be limited to the standards available to *courts* in deciding cases on the merits. In formulating standards, the Court sometimes takes their administrability by other decisionmakers into account. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government’s side with an essential interest in readily administrable rules.”); *Illinois v. Andreas*, 463 U.S. 765, 772 (1983) (observing that “[i]n fashioning a standard” to implement Fourth Amendment principles, the Court should seek a standard “workable for application by rank-and-file . . . officers”). But manageability by decisionmakers other than judges appears to be a separate concern.

⁴³ WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 954 (2d ed. unabr. 1979).

furnish an example. Although such tests are now widespread,⁴⁴ some Justices, judges, and commentators believe that intent tests prescribe an incoherent inquiry.⁴⁵ A multimember body such as a legislature has no unitary intent, critics emphasize, and they therefore regard the search for legislative intent as unintelligible. Other Justices, judges, and commentators obviously hold a different view. Some believe, for example, that the relevant question is factual, involving whether a constitutionally forbidden purpose functioned as a but-for cause of the enactment of legislation.⁴⁶

Another example of disagreement about intelligibility comes from the balancing test applied by the Supreme Court to determine whether state laws that do not deliberately discriminate against interstate businesses may nevertheless violate the dormant commerce clause. The applicable formula asks judges to weigh state and national interests to determine whether “the burden imposed on commerce is clearly excessive in relation to the putative local benefits.”⁴⁷ Although the Court’s majority obviously views this test as intelligible, Justice Scalia has maintained that it is not: “[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”⁴⁸

⁴⁴ See *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2734 (2005) (“[G]overnmental purpose is a key element of a good deal of constitutional doctrine.”); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 301 (1997) (identifying an increased reliance on purpose-based inquiries in constitutional doctrines); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 90–98 (1997) (cataloguing tests that inquire explicitly into purpose and tests that “can reasonably be viewed as surrogates for purpose tests”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (“First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”).

⁴⁵ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) (“[I]t is virtually impossible to determine the singular ‘motive’ of a collective legislative body”); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 214–21 (2d ed. 1986) (describing the difficulties in determining legislative intent); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164–65 (1978).

⁴⁶ See, e.g., Kagan, *supra* note 44, at 439 (“The issue of motive . . . is one of but-for causation”).

⁴⁷ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁴⁸ *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). For an introduction to the literature on the possible incommensurability of values, see Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998); and Symposium, *When Is a Line As Long as a Rock Is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 707 (1994).

Justice Scalia has also disputed the intelligibility of the “proportionality” test prescribed by the Court to identify excessively long criminal sentences that constitute forbidden “cruel and unusual” punishment. See *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment) (arguing that the test assumes retribution to be the sole aim of criminal punishment

2. *Practical Desiderata.* — Beyond the threshold requirement of intelligibility, it is possible to tease from the opinions of the Supreme Court a number of practical desiderata that guide assessments of judicial manageability. Importantly, each of these practical desiderata is capable of being realized to a greater or lesser degree.

(a) *Analytical Bite.* — Even if a test or standard is rationally comprehensible as applied to clear or paradigmatic cases, it may still be judicially unmanageable if it requires distinctions for which conceptual resources are lacking in too many instances. An example comes from the distinction that the Supreme Court once drew between activities that directly affect and those that only indirectly affect interstate commerce.⁴⁹ Although there may be clear examples of activities with direct effects on interstate commerce and of others with only indirect effects, many cases arose in which the distinction proved impossible to apply in an analytically rigorous way.⁵⁰ The problem was not that the criteria for sorting direct from indirect effects were difficult to apply, for criteria can be difficult to apply but still have plenty of resolving power in the hands of those who know how to deploy them competently. Rather, the problem was that there were no criteria sufficient to make nonarbitrary distinctions between direct and indirect effects, no matter how smart and knowledgeable the analyst might be. By the late 1930s, a majority of the Justices had therefore concluded that legal doctrines elaborating that distinction rested on untenable assumptions and should be abandoned.⁵¹

(b) *An (Important) Aside on Determinacy.* — The desideratum of analytical bite, or the capacity to structure an analysis that could in principle lead to correct results, is related to, but needs to be distinguished from, a demand for determinacy or “formal realizability,” the

and cannot be applied “intelligently” once deterrence, rehabilitation, and incapacitation are admitted as equally acceptable goals.

⁴⁹ See *Carter v. Carter Coal Co.*, 298 U.S. 238, 307–10 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–48 (1935).

⁵⁰ For an account of the deliberations and analysis that led the Court to repudiate its efforts to distinguish between direct and indirect effects on interstate commerce, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 212–22 (1998). See generally Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946* (pts. 1–2), 59 HARV. L. REV. 645, 883 (1946).

⁵¹ See *Wickard v. Filburn*, 317 U.S. 111, 122–23 (1942) (“In some cases sustaining the exercise of federal power over intrastate matters the term ‘direct’ was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with ‘substantial’ or ‘material’; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.” (citations omitted)); Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 133 (2002) (pointing out that “bright line distinctions” like the direct/indirect effect distinction “proved unworkable under modern economic conditions and were abandoned when the tide of Commerce Clause interpretation turned at the height of the New Deal”).

paradigm case of which would be “a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.”⁵² If formal realizability were a requirement of judicial manageability, a test would need to mandate clear results in all or nearly all cases, with little need for further contestable judgments, in order to count as judicially manageable. But there is no consensus that constitutional tests must always be determinate in this sense, as the recurrent debate about the comparative preferability of “rules” and “standards” illustrates.⁵³ Within the familiar dichotomy, rules are relatively determinate formulations that leave little room for case-by-case judgment apart from the ascertainment of facts. By contrast, standards require more judgment in application even though they could, in principle, generate correct, nonarbitrary results. According to a familiar example, “no driving over sixty-five miles per hour” is a rule, whereas “no driving at unreasonably unsafe speeds” is a standard. A standard such as this has considerable analytical bite. The question whether driving at a particular rate of speed was reasonable under specified conditions will frequently have a correct answer on which informed observers could be expected to converge (even if there are some doubtful cases). Nonetheless, application of the standard would require judgments that application of the rule would not.

Some Justices strongly prefer rules to standards;⁵⁴ others opt for standards in many circumstances.⁵⁵ No one doubts, however, that constitutional law makes frequent use of standards, often without anguish concerning their judicial manageability. Balancing tests play a relatively prominent role in constitutional law.⁵⁶ To take an even more extreme example, the Supreme Court prescribes the resolution of some constitutional issues based on an assessment of the “totality of the circumstances.”⁵⁷ Justice Scalia, the Court’s foremost champion of rules,

⁵² Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976).

⁵³ See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–68 (1992); Kennedy, *supra* note 52, at 1687–1713; Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–69 (1992).

⁵⁴ See Sullivan, *supra* note 53, at 80–88 (describing Chief Justice Rehnquist’s and Justice Scalia’s expressed preferences for rules in constitutional interpretation).

⁵⁵ See *id.* at 88–95 (describing Justices Stevens’s, Souter’s, O’Connor’s, and Kennedy’s preferences for standards in some contexts); see also Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O’Connor’s Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 838–44 (2001) (describing how Justice O’Connor’s Religion Clause jurisprudence balances competing interests).

⁵⁶ See Fallon, *supra* note 44, at 77–83.

⁵⁷ See, e.g., *Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003) (“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”); *United States v. Banks*, 124 S. Ct. 521,

has repeatedly castigated this formula as a betrayal of rule-of-law ideals,⁵⁸ yet he has occasionally called for totality-of-the-circumstances inquiries himself.⁵⁹

The prominence of relatively open-ended tests in constitutional law presents a central puzzle about the demand for judicially manageable standards. Sometimes the Supreme Court (or at least a majority of the Justices) regards such standards, including totality-of-the-circumstances tests, as judicially manageable. But sometimes it does not. In *Vieth*, for example, a majority of the Justices plainly would have regarded an instruction to courts to identify constitutionally forbidden gerrymanders in light of the totality of the circumstances as not judicially manageable.⁶⁰ If some standards are judicially manageable, whereas others are not, the obvious question is how to tell the difference. Indeterminacy may sometimes contribute to a lack of judicial manageability, but not every vague constitutional test necessarily counts as judicially unmanageable.

(c) *Ability To Generate Predictable and Consistent Results.* — If we ask why some indeterminate standards are judicially manageable whereas others are not, the answer seems to lie largely in predictive judgments about the pattern of results that decisionmaking pursuant to any particular standard would likely produce. As Justice Scalia has

525 (2003) (“[W]e have treated [Fourth Amendment] reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.”); *Georgia v. Ashcroft*, 539 U.S. 461, 479–80 (2003) (applying a totality-of-the-circumstances test to determine whether a redistricting plan that considered race violated the Equal Protection Clause); *United States v. Drayton*, 536 U.S. 194, 207 (2002) (considering the “totality of the circumstances” to determine whether a search was voluntary); *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (“When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981))).

⁵⁸ See *Morrison v. Olson*, 487 U.S. 654, 733–34 (1988) (Scalia, J., dissenting) (calling the totality-of-the-circumstances test an “ad hoc approach to constitutional adjudication” that is “ungoverned by rule, and hence ungoverned by law”); Scalia, *supra* note 27, at 1182 (“[W]here an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, . . . he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is . . . an acknowledgment that we have passed the point where ‘law,’ properly speaking, has any further application.”).

⁵⁹ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 463–64 (2000) (Scalia, J., dissenting) (defending a totality-of-the-circumstances approach as preferable to the *Miranda* rules for ascertaining the voluntariness of confessions).

⁶⁰ The plurality opinion clearly regarded a totality-of-the-circumstances approach as judicially unmanageable. See *infra* p. 1290 (discussing the *Vieth* plurality’s criticism of a proposed totality-of-the-circumstances “fairness” test). All of the dissenting Justices in *Vieth* also assumed an obligation to propose tests that would give clearer guidance to lower courts. See *supra* note 3 (discussing tests proposed by the dissenting Justices).

written, “[p]redictability . . . is a needful characteristic of any law worthy of the name.”⁶¹ Accordingly, when lower courts likely would apply a proposed standard unpredictably or inconsistently, the standard is likely to be deemed judicially unmanageable.

But when are standards likely to be applied predictably and when not? Although no wholly adequate answer is possible, the fact situation in *Vieth* suggests some variables that might matter. One involves relative consensus or lack of consensus about the meaning of underlying norms.⁶² The *Vieth* plurality thought there to be no consensus about when partisan gerrymandering becomes so unfair as to amount to a denial of equal protection, as evidenced by its brusque dismissal of the test proposed by Justice Lewis Powell in *Davis v. Bandemer*.⁶³ According to the *Vieth* plurality, Justice Powell essentially asked the lower courts to determine whether particular gerrymanders were “fair.”⁶⁴ “Some criterion more solid and more demonstrably met than [fairness] seems to us necessary to enable the state legislatures to discern the limits of their districting discretion [and] to meaningfully constrain the discretion of the courts,” Justice Scalia wrote.⁶⁵ By contrast, judicial tests that appeal directly to apprehensions of “fairness” and “justice” are by no means uncommon in other contexts⁶⁶ in which, presumably, the Justices expect courts to converge relatively predictably in their judgments about what is unfair or unjust. Relatedly, the *Vieth* plurality may have thought that the partisan implications of political gerrymandering cases would unsettle judicial judgment and thereby produce inconsistent decisions.⁶⁷

⁶¹ Scalia, *supra* note 27, at 1179.

⁶² See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1793 (2004) (Kennedy, J., concurring in the judgment) (“Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.”).

⁶³ 478 U.S. 109 (1986).

⁶⁴ *Vieth*, 124 S. Ct. at 1784 (plurality opinion).

⁶⁵ *Id.*; see also *id.* at 1793 (Kennedy, J., concurring in the judgment) (“Absent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent.”).

⁶⁶ See, e.g., *Kansas v. Colorado*, 125 S. Ct. 526, 534–35 (2004) (describing how “considerations of fairness” play a key role in the design of equitable remedies); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (suggesting that “fairness and justice” determine when a taking has occurred); *Zafiro v. United States*, 506 U.S. 534, 538 (1993) (citing Federal Rule of Civil Procedure 14’s allowance for conducting separate trials of codefendants when “justice requires”); *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992) (noting that the existence of personal jurisdiction turns on “traditional notions of fair play and substantial justice” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 566 (1987) (Blackmun, J., concurring in part and dissenting in part) (“A court may ‘make any order which justice requires’ to limit discovery” (quoting *FED. R. CIV. P. 26(c)*)).

⁶⁷ Concerns about predictability and consistency are substantially mooted, of course, in contexts in which it appears likely that nonjudicial decisionmakers will adapt their behavior to judicially articulated norms and thereby make repeated judicial enforcement unnecessary. As Rich-

(d) *Administrability Without Overreaching the Courts' Empirical Capacities.* — A test may be deemed judicially unmanageable if it would require courts to make empirical findings or predictive judgments for which they lack competence. To cite just one example, concerns about judicial capacity to grasp pertinent facts and assess the likely consequences of alternative policies have loomed large in lower court decisions holding that challenges to governmental actions in the domain of foreign affairs, especially involving the deployment of troops in hostile situations, present nonjusticiable political questions.⁶⁸ For instance, even if standards could be articulated for when a formal declaration of war must precede particular actions by the U.S. military, courts would frequently lack the resources to ascertain relevant facts.

More often than not, courts couple a determination that they lack competence to make factual or predictive judgments with a conclusion that another institution is both better situated and constitutionally obliged to make the requisite assessments.⁶⁹ In the context of war and

ard Pildes has argued, “[i]f regulated actors face the proper incentives, constitutional constraints can become self-enforcing,” even if courts would otherwise find it difficult to apply those constraints to marginal cases. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 66 (2004). As an example, Professor Pildes instances the doctrine of *Shaw v. Reno*, 509 U.S. 630 (1993), which permits “appropriate and reasonably necessary uses of race” in the design of electoral districts but insists that race must not be the predominant factor. Pildes, *supra*, at 67 (quoting *Bush v. Vera*, 517 U.S. 952, 995 (1996) (O’Connor, J., concurring)) (internal quotation marks omitted); *see also* *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Miller v. Johnson*, 515 U.S. 900, 920 (1995). According to Professor Pildes, “[r]isk-averse” politicians charged with drawing district lines have largely “internalized” this vague prohibition and steered clear of it. Pildes, *supra*, at 68. Rightly or wrongly, the *Vieth* plurality obviously doubted that political decisionmakers would have steered comparably clear of a vague prohibition against partisan gerrymanders.

⁶⁸ *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (deeming the legality of Cambodian bombing a nonjusticiable political question because it raised “precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary”); *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (“Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an ‘escalation’ of the war or is merely a new tactical approach within a continuing strategic plan.”); *United States v. Sisson*, 294 F. Supp. 515, 517–18 (D. Mass. 1968) (dismissing the defendant’s claims regarding the legality of war-fighting tactics in Vietnam because a “domestic tribunal is incapable of eliciting the facts during a war, and because it is probably incapable of exercising a disinterested judgment which would command the confidence of sound judicial opinion”).

⁶⁹ *See, e.g., Holtzman*, 484 F.2d at 1309 (“Beyond determining that there has been *some* mutual participation between Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question.” (quoting *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971))); *DaCosta*, 471 F.2d at 1157 (“[W]e must recognize that those two coordinate branches of government — the Executive by military action and the Congress, by not cutting off the appropriations that are the wherewithal for such action — have taken a position that is not within our power, even if it were our wish, to alter by judicial decree.”);

foreign affairs, judgments of nonjusticiability therefore tend to conjoin reasoning that emphasizes judicial incompetence with suggestions that the disputed questions are assigned to other branches. Nevertheless, concerns about the practical competence of courts to conduct relevant inquiries possess some distinctive weight.

(e) *Capacity To Structure Awards of Remedies*. — Concerns about standards to guide the award of remedies occasionally influence judicial decisions to dismiss disputes on political question grounds. An example comes from *Gilligan v. Morgan*.⁷⁰ Following an incident in which members of the Ohio National Guard killed a number of civilians at Kent State University, the *Gilligan* plaintiffs brought suit asking a court to order changes in the Guard's organization and supervision.⁷¹ On appeal, the Supreme Court ordered dismissal under the political question doctrine.⁷² In holding that the dispute did not lend itself to resolution under judicially manageable standards, Chief Justice Warren Burger emphasized the lack of practical judicial competence to fashion a remedy.⁷³ Similarly, Justice Scalia's opinion in *Vieth* suggested that the plurality's worries about remedial standards might have influenced its ruling. If the Court had ruled on and upheld the challengers' claims, the appropriate remedy would by no means have followed directly. There are countless lawful ways in which Pennsylvania's electoral districts might have been redrawn, and the plurality expressed anxiety about the absence of clear and defensible standards for choosing among them. "The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for courts to say when a violation has occurred, and to design a remedy," Justice Scalia wrote.⁷⁴

Looming uncertainties about standards for the award of remedies do not always, or even typically, lead to the conclusion that a dispute should be deemed nonjusticiable. As Abe Chayes pointed out in a classic article, judges in "public law litigation" frequently confront situations in which myriad potential remedies exist for a constitutional violation and in which the choice among them could have broad im-

Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982) ("[T]he factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable. . . . [Such questions] are appropriate for congressional, not judicial, investigation and determination."), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983).

⁷⁰ 413 U.S. 1 (1973).

⁷¹ See *id.* at 3, 5–6.

⁷² See *id.* at 10.

⁷³ See *id.* at 10–12. By contrast, the Court identified no justiciability problems with the claims advanced in *Scheuer v. Rhodes*, 416 U.S. 232, 234–35 (1974), another case arising from the same incident, but one in which the plaintiffs sought damages rather than injunctive relief.

⁷⁴ *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1785 (2004) (plurality opinion) (emphasis added).

plications.⁷⁵ In most public rights cases, courts first rule on the merits, then struggle with remedial issues. Sometimes, however, worries about the difficulty of crafting remedies contribute to decisions that a category of disputes is nonjusticiable.

3. *Further Normative Determinants of Fitness of Adjudication.* — The practical desiderata that I have discussed so far all focus attention on reasonably specific concerns involving the capacity of legal standards to guide judicial decisionmaking, to prescribe inquiries that lie within courts' factfinding competence, and to produce substantial convergence on correct outcomes. All, however, raise questions of sufficiency. For example, exactly how much analytical bite, or how much predictability or consistency of judicial decisionmaking, is needed for a test to count as judicially manageable?⁷⁶

Although I cannot formally prove the point, I think it reasonably clear that these questions have no transsubstantive answer: there is no single quantum that would be both necessary and sufficient in every case, regardless of the nature and importance of the constitutional provision at issue. Justice Scalia hinted as much in *Vieth* when he said that although "courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from race discrimination) is clear," comparable degrees of "unmanageability" would not be acceptable in enforcing other constitutional norms.⁷⁷ Rather, a further normative inquiry occurs as courts judge the ultimate appropriateness of permitting the adjudication of claims under one or another standard after all the other assessments have occurred. The inquiry at this stage seems perhaps no better defined than the question whether, all things considered, the costs of permitting adjudication under a particular proposed standard outweigh the benefits.

In *Vieth*, the concern with ultimate costs and benefits echoed through the dissenting opinions. None of the dissenting Justices claimed that his proposed standard perfectly satisfied the criteria defining judicial manageability. All argued instead that in light of the grave threats that partisan gerrymanders pose to democratic ideals,

⁷⁵ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-96 (1976).

⁷⁶ The Supreme Court occasionally addresses such questions quite explicitly. See, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'").

⁷⁷ *Vieth*, 124 S. Ct. at 1781 (plurality opinion).

their tests were preferable to the alternative of no judicial oversight whatsoever.⁷⁸

Interestingly, however, the opinion in *Vieth* that most clearly acknowledged the need for an ultimate, all-things-considered assessment of costs and benefits came from Justice Scalia. In a remarkable passage near the end of his opinion, after noting that the frequency of litigation would likely increase with the vagueness of any standard that the Court might prescribe, Justice Scalia pronounced the plurality's all-things-considered judgment:

Is the regular insertion of the judiciary into districting, with the delay and uncertainty that it brings to the political process and the partisan . . . enmity it brings upon the courts, worth the benefit to be achieved — an accelerated (by some unknown degree) effectuation of the majority will? We think not.⁷⁹

In one sense, the plurality's judgment could not have been clearer: to allow judicial challenges to partisan gerrymanders would do more harm than good. In another sense, however, the plurality's reasoning was opaque.⁸⁰ How does one weigh the value of "an accelerated . . . effectuation of the majority will" against the practical risks of increased judicial involvement in districting processes? What other factors, if any, could permissibly influence an ultimate judgment about whether the costs of allowing litigation would exceed the benefits?⁸¹ In *Vieth*, Justice Scalia seemed prepared to treat potential public "enmity" for the courts as a cost that helped to justify a judgment of non-justiciability. Indeed, he expressed concern with public acceptability at least twice — once in rejecting an open-ended fairness inquiry that

⁷⁸ See *id.* at 1813 (Stevens, J., dissenting) (charging the plurality with "a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially"); *id.* at 1821 (Souter, J., dissenting) (acknowledging that "[t]he enquiries I am proposing are not . . . as hard-edged as I wish they could be" but defending them on the ground that they would allow "the courts to identify at least the worst cases of gerrymandering"); *id.* at 1827, 1829 (Breyer, J., dissenting) (conceding that the problem of identifying forbidden gerrymanders would not be "easily solved" under his approach but defending judicial involvement partly because "[t]he risk of harm to basic democratic principles is serious").

⁷⁹ *Id.* at 1789 (plurality opinion) (emphasis omitted).

⁸⁰ Critics have frequently complained that balancing tests are opaque. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–83 (1987); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 47–60 (1987).

⁸¹ Among the concerns cited by the *Vieth* plurality were interests in avoiding costly litigation that was likely to yield plaintiffs no redress, *Vieth*, 124 S. Ct. at 1777 (plurality opinion) (noting that even failed litigation produces attorneys' fees), threats of "election-impeding lawsuit[s]," *id.* at 1781, and the apprehension that although "courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear[,] . . . they are not justified in inferring a judicially enforceable constitutional obligation . . . which is both dubious and severely unmanageable," *id.*

he thought would fail to win “public acceptance for the courts’ intrusion into a [districting] process that is the very foundation of democratic decisionmaking”⁸² and again in noting the “partisan . . . enmity” that adjudication pursuant to another vague standard would “bring[] upon the courts.”⁸³ In other contexts, however, he has maintained that public perceptions have no bearing on the Court’s decisions.⁸⁴ Why the disparity?

The Court appears equally concerned with costs and benefits in other cases but also little disposed to define precisely the factors that enter its cost-benefit calculus. In *Nixon v. United States*,⁸⁵ for example, Chief Justice Rehnquist buttressed the Court’s curt holding that there were no judicially manageable standards for giving content to the word “try” in the Impeachment Trial Clause with appeals to a web of surrounding considerations. Especially in the case of a presidential impeachment, he reasoned, “opening the door of judicial review . . . would ‘expose the political life of the country to months, or perhaps years, of chaos.’”⁸⁶ The conclusion may be right, but one wonders what kinds of considerations, if any, the Chief Justice would have allowed into the balance on the other side.

The evidently open-ended, all-things-considered aspect of the Court’s ultimate assessments of judicial manageability is obviously important. It might also appear to be ironic. Among the principal reasons to want judicially manageable standards is to cabin judicial discretion. Yet the ultimate judgment of judicial manageability or nonmanageability implicates a discretion very like that which the Court seeks to limit when it insists that constitutional adjudication cannot occur in the absence of judicially manageable standards. Justice Scalia’s plurality opinion in *Vieth* exhibits the contrast in stark form. Why, in his view, was asking whether the benefits of judicial intrusion into partisan gerrymandering disputes would exceed the costs

⁸² *Id.* at 1784.

⁸³ *Id.* at 1789. Justice Scalia has exhibited a similar concern with the public acceptability and transparency of judicial tests in other contexts. The “trouble with” deciding equal protection cases under broad principles, he has written, is that “if the system of justice is to be respected,” the bases for judicial differentiation among cases must be clearly understandable by the public based on rules laid down in advance. Scalia, *supra* note 27, at 1178. It is therefore “[m]uch better,” he has said, “even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.” *Id.*

⁸⁴ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“Instead of engaging in the hopeless task of predicting public perception — a job not for lawyers but for political campaign managers — the Justices should do what is *legally* right . . .”).

⁸⁵ 506 U.S. 224 (1993).

⁸⁶ *Id.* at 236 (quoting *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

not like inquiring “whether a particular line is longer than a particular rock is heavy”?⁸⁷

The answer to this question must lie in a distinction between first- and second-order tests or standards. As formulated by the Supreme Court, the demand for judicial manageability applies only to the first-order rules employed by courts to identify constitutional violations in particular cases, not to the second-order tests or processes pursuant to which the Court ascertains whether judicially manageable first-order standards exist. The situation could hardly be otherwise. A demand that the same standards should govern the choice of rules of decision to be applied by courts and the choice of rules for choosing the rules to be applied by courts would wrench the concept of judicially manageable standards from the linguistic and institutional context on which its meaning depends. What is more, because no rule can govern its own application, any demand that the second-order process of choosing rules for the choice of judicially manageable standards should be governed by the same rules as the first-order identification of judicially manageable standards could at most only postpone an ultimate, open-ended, value-based choice about how best to implement constitutional norms that are not themselves judicially manageable standards in the input sense.

Nevertheless, inquiry into the process by which the Court ultimately determines whether proposed tests suffice as judicially manageable has yielded an important conclusion. In determining whether judicially manageable first-order standards exist, the Supreme Court may begin with a set of reasonably clear desiderata, but in determining whether those desiderata are sufficiently satisfied, the Justices make substantially open-ended judgments about whether it would be better, all things considered, to allow litigation to proceed or instead to decree a category of disputes nonjusticiable.

C. A Partial Summary

At the end of this inquiry into the branch of the political question doctrine that permits adjudication only pursuant to judicially manageable standards, three points seem both clear and important enough to merit summary. First, the notion of judicially manageable standards functions as both an input and an output of constitutional adjudication. Upon determining that the language of a constitutional provision is not itself a judicially manageable standard at the input stage, the Supreme Court assumes a responsibility to devise a judicially manageable standard as an output of its adjudicative process. In a sense, the conclusion that there are no judicially manageable standards therefore

⁸⁷ *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988).

reflects a judicial failure, albeit a failure that may be less blameworthy than the articulation and enforcement of an unmanageable standard. Second, in devising judicially manageable standards, the Court seeks a reasonable fit, but not necessarily a perfect one, with the meaning of the constitutional norm in issue. Close enough is good enough. Third, in determining whether a particular standard counts as judicially manageable, the Court is guided partly by analytic criteria, but its judgment may ultimately turn on an open-ended assessment of whether, as the plurality put it in *Vieth*, the costs of allowing adjudication on the merits are “worth the benefit to be achieved.”⁸⁸

II. JUDICIALLY MANAGEABLE STANDARDS BEYOND THE POLITICAL QUESTION DOCTRINE

The political question doctrine is not the only constitutional doctrine that reflects a concern with judicially manageable standards, nor is it the only one in which the demand for judicial manageability creates a gap between constitutional meaning and the tests that courts employ to decide constitutional cases. To the contrary, the political question doctrine is more like the tip of the iceberg. It protrudes and attracts attention in the small category of cases in which courts either fail to develop judicially manageable standards or struggle openly to do so. Beneath the exposed tip lies the overwhelming bulk of cases in which courts either formulate manageable standards or, more commonly, apply judicially manageable standards that are the outputs of past decisions.

Equal protection doctrine exemplifies the pervasiveness of judicially developed and manageable standards in constitutional law. In *Vieth v. Jubelirer*, all of the Justices assumed that the unadorned words of the Equal Protection Clause fail to establish a judicially manageable standard. Outside the context of challenges to partisan gerrymanders, however, courts routinely adjudicate equal protection cases, typically pursuant to judicially manageable standards devised by the Supreme Court. These include tests that call for courts to sustain some classifications only if they are necessary to promote a compelling interest,⁸⁹ to uphold others if they are substantially related to important governmental interests,⁹⁰ and to examine yet others to determine whether they are rationally related to legitimate governmental interests.⁹¹ None of these tests tracks the language of the Equal Pro-

⁸⁸ *Vieth*, 124 S. Ct. at 1789 (plurality opinion).

⁸⁹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁹⁰ See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁹¹ See, e.g., *Harris v. McRae*, 448 U.S. 297, 324 (1980); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 n.39 (1979).

tection Clause, nor has the Supreme Court attempted to link them to the original historical understanding. And these, of course, are only the most familiar equal protection tests. Other, more context-specific formulae guide inquiries into the permissibility of facially neutral classifications that have a disparate impact on racial minorities,⁹² of electoral schemes designed to create majority-minority voting districts,⁹³ of decisions bearing on the counting of votes,⁹⁴ and of statutes regulating the exercise of fundamental rights by some but not by others.⁹⁵

Other constitutional provisions have required courts to develop similarly thick catalogues of tests.⁹⁶ When the Court acknowledges its need to fashion a test,⁹⁷ it sometimes expressly justifies its selection as more manageable than the alternatives.⁹⁸ Even when it does not, the demand for judicial manageability is an inescapable concern, as the political question doctrine makes vivid.

A. *Implementing the Constitution Through Doctrinal Tests*

Judicial tests that either underenforce or overenforce constitutional norms, which have spawned much recent discussion among commentators,⁹⁹ both furnish illustrations of and draw their explanations

⁹² See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

⁹³ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995).

⁹⁴ See, e.g., *Bush v. Gore*, 531 U.S. 98, 110 (2000).

⁹⁵ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969).

⁹⁶ See generally Fallon, *supra* note 44, at 67–106 (surveying and appraising varieties of constitutional tests).

⁹⁷ See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 395–96 (1990) (acknowledging the need for courts to “develop” judicially manageable standards “for determining whether a bill is ‘for raising Revenue’ or where a bill ‘originates’” but finding “no reason that developing such standards will be more difficult in this context than in any other” (quoting U.S. CONST. art. I, § 7, cl. 1)); *Rogers v. Lodge*, 458 U.S. 613, 630–31 (1982) (Powell, J., dissenting) (maintaining that “the standard used to identify unlawful racial discrimination in [the design of voting districts] should be defined in terms that are judicially manageable” and proposing an inquiry based wholly on “objective factors”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73–74 (1973) (Brennan, J., dissenting) (reviewing efforts to define a category of obscenity unprotected by the First Amendment and observing that no area of law had “remained so resistant to the formulation of stable and manageable standards”).

⁹⁸ See, e.g., *Oregon v. Kennedy*, 456 U.S. 667, 675–79 (1982) (rejecting prior formulations for determining when the Double Jeopardy Clause bars a retrial after the defendant has successfully moved for a mistrial and adopting, as more “manageable,” a test under which double jeopardy attaches only when the conduct giving rise to a mistrial was intended to provoke a motion for a mistrial); *Jackson v. Virginia*, 443 U.S. 307, 320 (1979) (rejecting a doctrinal test on the ground that it “fails to supply a workable or even a predictable standard for determining whether the due process command . . . has been honored”).

⁹⁹ The best overview of the relevant literature is Berman, *supra* note 9. There are, of course, important voices dissenting from the idea that constitutional rights are independent of the tests that enforce them, notably including Daryl Levinson. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999) (attacking “[t]he rights-

largely from the demand for judicially manageable standards. Because others have called attention to the phenomena of judicial under- and overenforcement of the Constitution, I offer only a brief summary, emphasizing the role of judicial manageability as one important factor in doctrinal design.

1. *Underenforced Norms.* — The intellectual pathbreaker in identifying tests that underenforce the Constitution was Larry Sager.¹⁰⁰ In a celebrated article published in 1978, Sager argued that courts do not enforce all constitutional norms to their “full conceptual limits.”¹⁰¹ In designing doctrinal tests, he maintained, courts are sometimes constrained by “institutional” considerations including the limited “competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them.”¹⁰² As a result, Sager asserted, a number of important constitutional norms are underenforced.¹⁰³ Nevertheless, he insisted, it would be a mistake to equate judicial enforcement, and thus the tests applied by courts, with the meaning of constitutional guarantees. Even in the absence of judicial enforcement, constitutional norms continue to bind Congress, the President, and other governmental officials on whom the responsibility for constitutional implementation therefore devolves.¹⁰⁴

Among the considerations that might lead courts to underenforce constitutional norms, Sager specifically listed difficulties in devising “workable standards.”¹⁰⁵ Although he did not define this term precisely, his discussion cited some of the concerns to which courts appeal in judging whether standards count as judicially manageable.¹⁰⁶ Candidates for the category of doctrinal tests that underenforce constitutional norms, but include judicial manageability among their attractions, include the following:

The “Some Evidence” Test. An unmistakable example of constitutional underenforcement comes from the “some evidence” test fash-

essentialist picture, in which courts begin with the pure, Platonic ideal of a constitutional right and only then pragmatically apply the right through the vehicles of implementation and remediation” on the ground that it “bears little resemblance to the actual practice of rights-construction”). For a critical discussion of “pragmatist” views denying the existence of any meaningful distinction between constitutional rights and the judicial doctrines through which rights are enforced, see *infra* Part III, pp. 1313–17.

¹⁰⁰ See Sager, *supra* note 4.

¹⁰¹ *Id.* at 1221.

¹⁰² *Id.* at 1217–18.

¹⁰³ *Id.* at 1219.

¹⁰⁴ See *id.* at 1221 (“[T]he legal powers or legal obligations of government officials which are subtended in the unenforced margins of underenforced constitutional norms are to be understood to remain in full force.”).

¹⁰⁵ *Id.* at 1217.

¹⁰⁶ See *id.* at 1217–18 (discussing factors that have led to judicial restraint “in the application of the equal protection clause to state regulatory and taxation measures”).

ioned by the Supreme Court for application to some challenges under the Due Process Clause, including those in which inmates complain that prison authorities have disciplined them unfairly.¹⁰⁷ Courts should reject such prison disciplinary challenges, the Justices have ruled, as long as “some evidence” supports the challenged action.¹⁰⁸ As a measure of the meaning of due process, the “some evidence” test falls short. The Due Process Clause imposes obligations on the government and its officials. By contrast, the “some evidence” test establishes a standard of review for courts to apply.¹⁰⁹ If prison officials spitefully or maliciously imposed sanctions on an inmate that they knew to be innocent of any disciplinary offense, their actions would constitute a deprivation of liberty without “due process of law” in the most basic sense, even if they could point to “some evidence” supporting their bogus determinations. If the shortfall in judicial enforcement can be justified, concerns of judicial manageability furnish part of the defense. It is easy for a court to gauge whether an administrative record contains supporting evidence, much more difficult to determine whether an official acted correctly. In addition, the Court may believe that prisoners’ suits are likely to be vexatious and trivial and that the costs of full judicial enforcement of constitutional norms would therefore outweigh the benefits.

Doctrines Prescribing Deference to Official Decisions, Such as Those by Military and Prison Officials. The Supreme Court frequently insists that courts should hesitate to second-guess military and prison officials even in constitutional cases. In *Rostker v. Goldberg*,¹¹⁰ the Court stated flatly that “judicial deference . . . is at its apogee” in challenges to military regulations.¹¹¹ To some extent, the relaxed standard of review reflects the Court’s judgment that the Constitution establishes different standards for military life than it does for civilian

¹⁰⁷ See generally Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence”*, 25 SAN DIEGO L. REV. 631, 663–64 (1988) (characterizing the “some evidence” requirement as a standard of review, not a measure of the constitutional obligations of administrative decisionmakers). The Court also applies the “some evidence” test in habeas corpus cases involving challenges to the factual predicates for executive branch decisions to deport aliens from the United States, see, e.g., *INS v. St. Cyr*, 533 U.S. 289, 306 (2001), and occasionally in other contexts too, see, e.g., *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 312 (1946) (“If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry [into military custody of a selective service registrant] is at an end.” (citations omitted)).

¹⁰⁸ See *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455–56 (1985) (“[T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits.”).

¹⁰⁹ See Neuman, *supra* note 107, at 663–64.

¹¹⁰ 453 U.S. 57 (1981).

¹¹¹ *Id.* at 70.

life.¹¹² The Court has also made clear, however, that the tests used in military cases do not straightforwardly describe constitutional obligations, but instead specify the appropriate standard of judicial review for military decisions.¹¹³ The gap arises because, as the Court has emphasized, “courts are ill-equipped to determine the impact upon [military] discipline that any particular intrusion upon military authority might have.”¹¹⁴ Concerns about likely judicial incapacity to apprehend relevant facts and anticipate consequences thus spur a demand for judicial deference.¹¹⁵

Similar considerations result in judicial underenforcement of the Constitution in prison cases. The leading case of *Turner v. Safley*¹¹⁶ holds squarely that most infringements even of prisoners’ fundamental rights must be upheld as long as they are “reasonably related to legitimate penological interests.”¹¹⁷ What is more, the Supreme Court has mandated a relaxed application even of this loose standard. In explaining its “broad hands-off attitude toward problems of prison administration,”¹¹⁸ it has emphasized that courts are poorly situated to

¹¹² See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 506–07 (1986) (“[W]e have repeatedly held that ‘the military is, by necessity, a specialized society separate from civilian society.’” (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974))); *Greer v. Spock*, 424 U.S. 828, 837–38 (1976) (rejecting a claim that a military base is a public forum for First Amendment purposes in light of the “special constitutional function of the military in our national life”); *Parker*, 417 U.S. at 756–58 (rejecting vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice on the ground that “the different character of the military community and of the military mission requires a different application of [First Amendment] protections”).

¹¹³ See, e.g., *Goldman*, 475 U.S. at 507 (emphasizing that “courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest”); *Rostker*, 453 U.S. at 71 (reading precedent not as applying “a different equal protection test because of the military context,” but rather as stressing “the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance”).

¹¹⁴ *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)) (internal quotation mark omitted); see also *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (declining to exercise judicial review over the training, weaponry, and standing orders of the Ohio National Guard for reasons of nonjusticiability and noting that “it is difficult to conceive of an area of governmental activity in which the courts have less competence”); *id.* (“The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”).

¹¹⁵ See *Rostker*, 453 U.S. at 71 (stressing the appropriateness of deference to congressional judgments); *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953) (denying the plaintiff’s habeas challenge to his military duty assignment as inconsistent with the terms of his induction on the ground of deference to military judgment and noting that “[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters”).

¹¹⁶ 482 U.S. 78 (1987).

¹¹⁷ *Id.* at 89.

¹¹⁸ *Procunier v. Martinez*, 416 U.S. 396, 404 (1974).

make the calculations that full and reasonable enforcement of the Constitution would require.¹¹⁹

In prison cases as much as military cases, the Court's professed concern about limited judicial capacities is almost certainly matched with, and possibly driven partly by, calculations of costs and benefits. The Justices likely believe that judicial enforcement of the Constitution to what Professor Sager calls its "full conceptual limits" would generate litigation and other costs that too greatly exceed the good that courts could accomplish. For my purposes, it is important only to emphasize that concerns about judicial capacity to make relevant empirical calculations are part of the all-things-considered assessment that leads the Court to adopt a relaxed standard of review.

Nondelegation Doctrine. As classically formulated, the nondelegation doctrine holds that Congress cannot delegate its legislative power.¹²⁰ To enforce this prohibition, the Supreme Court has said that Congress can authorize rulemaking by an administrative agency only if it lays down "an intelligible principle to which the [agency] is directed to conform."¹²¹ In practice, however, the Court's interpretations have rendered this formulation almost entirely toothless: the Justices have not invalidated a congressional delegation since 1935.¹²² Commentators thus agree with near unanimity that the Constitution's nondelegation norm goes essentially unenforced.¹²³ The most cogent explanation includes considerations of judicial manageability: the

¹¹⁹ See *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001) (rejecting a claim that inmates have a First Amendment right to give legal advice to other inmates and noting that "courts are particularly 'ill equipped' to deal" with the problems of prisons (quoting *Procunier*, 416 U.S. at 405)); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349–50, 353 (1987) (noting the courts' lack of institutional competence and applying *Turner* to reject a free exercise challenge to prison regulations); *Turner*, 482 U.S. at 84–85, 89 (establishing a relaxed standard of review in light of courts' relative lack of expertise in prison administration and separation-of-powers concerns).

¹²⁰ See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693–94 (1892).

¹²¹ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹²² See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); see also PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 66 (10th ed. 2003) (noting that the Supreme Court "rarely finds a statutory delegation it can't sustain").

¹²³ See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630 (1992) ("[U]nenforced or underenforced constitutional norms include the nondelegation doctrine . . ."); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2102 (2004) (referring to the "present unenforced form" of the nondelegation doctrine); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 338 (2000) (noting that "the ban on unacceptable delegations is a judicially underenforced norm"); see also *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (expressing doubt that "the intelligible principle doctrine serves to prevent all cessions of legislative power"); Berman, *supra* note 9, at 75–76 (arguing that the nondelegation doctrine is a "decision rule" that does not perfectly reflect the underlying constitutionally "operative proposition" forbidding delegations of legislative power).

Supreme Court has felt unable to devise a meaningful test that would yield both predictable and practically acceptable results.¹²⁴

2. *Overenforced Norms.* — Whereas Larry Sager argued that courts sometimes underenforce the Constitution, in a 1975 article Henry Monaghan identified a partly parallel phenomenon of overenforcement.¹²⁵ Monaghan focused on doctrines that were clearly designed to promote constitutional values but that he thought impossible to rationalize as the product of ordinary constitutional interpretation.¹²⁶ Perhaps the most vivid example came from *Miranda v. Arizona*,¹²⁷ which initiated the requirement of so-called *Miranda* warnings in order for confessions obtained through custodial interrogations to be admissible in criminal trials.¹²⁸ Although Monaghan believed *Miranda* impossible to justify as an explication of the Constitution's meaning, he defended it and a number of other instances of overenforcement as a species of constitutional common law developed to protect values that would otherwise prove difficult for the courts to enforce.¹²⁹ Recast in terms of judicially manageable standards, Monaghan's argument claimed that identified doctrines overenforcing the Constitution derived their justification from their efficacy in framing intelligible inquiries, within the empirical competence of courts to answer, and from yielding predictable results the overall benefits of which exceeded the costs.

By identifying judicial overenforcement of the Constitution, Monaghan helped to inspire a debate about the lawful authority, if any, for courts to promulgate "prophylactic" rules.¹³⁰ As defined in the litera-

¹²⁴ Judicial underenforcement is so extreme in the case of the nondelegation doctrine as to border on nonenforcement, but there is an important practical difference between de facto nonenforcement on the merits and formal application of the political question doctrine — namely, the preservation of judicial options in future cases. For further discussion, see *infra* section II.B, pp. 1306–09.

¹²⁵ Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

¹²⁶ See *id.* at 2–3 (maintaining that "a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order — a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress").

¹²⁷ 384 U.S. 436 (1966).

¹²⁸ See *id.* at 478–79; Monaghan, *supra* note 125, at 20–23.

¹²⁹ See Monaghan, *supra* note 125, at 23 (suggesting that "legislative rules," such as that established by *Miranda*, "can be adequately rationalized as constitutional common law").

¹³⁰ See, e.g., Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985) ("What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution."); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1171 (1978) (arguing that "mere utility" is not a ground for constitutional authority). Monaghan had himself used the term "prophylactic" to describe the ap-

ture, prophylactic rules go beyond the Constitution's strict requirements in order to ensure that constitutional values receive effective vindication in practice, especially by the courts.¹³¹ Although both Monaghan and his early critics assumed prophylactic rules to be anomalous, David Strauss punctured that assumption. His article *The Ubiquity of Prophylactic Rules*¹³² argued convincingly that in fashioning constitutional doctrine, the Supreme Court routinely pays as much heed to practical considerations, the supposedly distinctive concern of prophylactic rules, as to constitutional language and historic understandings, the presumptively characteristic foci of true constitutional interpretation.¹³³

First Amendment doctrine holding that content-based regulations of speech are constitutionally suspect and therefore subject to strict judicial scrutiny¹³⁴ illustrates the overenforcement thesis. The concept of content-neutrality does not appear in the text of the First Amendment, nor does it have evident roots in early historical understandings.¹³⁵ In a persuasive article, Elena Kagan argues that the underlying constitutional concern, as apprehended by the Supreme Court,

proach taken by the *Miranda* Court in crafting what he termed a "legislative" rule. See Monaghan, *supra* note 125, at 22–23.

¹³¹ See, e.g., Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176–77 (1988) (defining a prophylactic rule as "a court-created rule that can be violated without violating the Constitution itself").

¹³² David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

¹³³ See *id.* at 195–207 (illustrating this thesis with examples); see also Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 25 (2001) (arguing that "there really isn't any such thing as a distinctively prophylactic rule that is in any important way distinguishable from the more run-of-the-mill doctrine that courts routinely establish").

¹³⁴ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 395–96 (1992) (noting that "[c]ontent-based regulations [of speech] are presumptively invalid" and striking down a hate speech ordinance due to the existence of content-neutral alternatives that could also achieve the government's compelling interests); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (subjecting a state flag-burning statute, as a content-based restriction, to "the most exacting scrutiny" (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988))); *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (upholding the defendant's conviction for burning his draft card only after determining that the statute's restriction on expressive conduct furthered an "important . . . governmental interest . . . unrelated to the suppression of free expression" and was "no greater than [was] essential to the furtherance of that interest").

¹³⁵ Historical scholarship suggests that the First Amendment was not originally understood to establish a broad prohibition against content-based governmental regulation of speech but only to abolish prior restraints and possibly the crime of seditious libel. See, e.g., ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 16–21 (1941) (contending that the First Amendment was intended to abolish seditious libel as well as prior restraints); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 119–43, 169–70 (1985) (arguing that the historical purpose of the Free Speech Clause was only to eliminate prior restraints, not to disturb the doctrine of seditious libel).

involves governmental censorship based on disagreement with ideas.¹³⁶ If the underlying norm prohibits only viewpoint-based censorship, then a nearly categorical bar against content-based regulation is a prophylactic. Not every content-based regulation will reflect a governmental intent to stifle ideas. But the content-neutrality rule is judicially manageable and otherwise acceptable, Kagan maintains, and the Court has made it the centerpiece of modern First Amendment doctrine largely for these reasons.¹³⁷

Professor Strauss's thesis concerning "the ubiquity of prophylactic rules" provided the implicit rationale for the Supreme Court's 2000 decision in *Dickerson v. United States*,¹³⁸ which held by 7–2 that Congress acted unconstitutionally when it passed a statute essentially instructing the federal courts to ignore *Miranda* in determining whether confessions are admissible into evidence.¹³⁹ In previous decisions, Court majorities — which included Justices who joined the opinion in *Dickerson* — had described *Miranda* as "prophylactic."¹⁴⁰ In *Dickerson*, however, the Court held that *Miranda* established a "constitutional" rule rather than a merely prophylactic, common law prescription and that Congress therefore could not displace it by legislation.¹⁴¹

If the *Miranda* rule is "constitutional," it must be because it is not materially different from other rules laid down in constitutional cases. It is routine, not anomalous, for the Court to fashion tests that do not perfectly capture the Constitution's meaning, and sometimes overenforce underlying norms, but possess other important virtues prominently including judicial manageability. Prior to *Miranda*, courts had struggled to determine whether confessions were voluntary or whether, instead, "a defendant's will was overborne."¹⁴² The *Miranda* rule, which is the epitome of a judicially manageable standard, solved with a single stroke the problems of analytical adequacy, strain on the judi-

¹³⁶ See Kagan, *supra* note 44, at 414, 428 (arguing that "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives").

¹³⁷ See *id.* at 516 (arguing that the content-neutrality requirement is a judicially manageable proxy for a direct inquiry into governmental motive).

¹³⁸ 530 U.S. 428 (2000).

¹³⁹ The Court, however, did not acknowledge what it was doing. See, e.g., Berman, *supra* note 9, at 28–29 (noting that the Court failed directly to meet the dissenting opinion's attack on the constitutional legitimacy of prophylactic rules).

¹⁴⁰ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 309 (1985); *Michigan v. Tucker*, 417 U.S. 433, 445–46 (1974); see also Richard H.W. Maloy, *Can a Rule Be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465, 2471–74 (2001) (discussing further examples).

¹⁴¹ See *Dickerson*, 530 U.S. at 438 (terming *Miranda* a "constitutional decision"); *id.* at 440 (characterizing *Miranda* as "constitutionally based").

¹⁴² *Id.* at 434 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973)) (internal quotation mark omitted).

ciary's empirical capacities, and predictability of judicial outcomes. The Court almost self-evidently chose this judicially manageable standard, in preference to other competitors, based on an all-things-considered assessment of its desirability.

B. Underenforcement, the Political Question Doctrine, and the Merits

Once it is recognized that a number of doctrinal tests underenforce constitutional norms (just as other tests produce overenforcement), often for reasons of judicial manageability, the branch of the political question doctrine involving judicially manageable standards takes on a new, less anomalous complexion. A holding that a category of cases is nonjusticiable in effect creates a judicially manageable standard, mandating dismissal, to guide future decisionmaking. Viewed along a spectrum, a determination of nonjusticiability due to the absence of judicially manageable standards is simply the limiting case of a decision to underenforce constitutional norms.¹⁴³

When the dismissal of cases on political question grounds is juxtaposed with the underenforcement of constitutional norms through rulings on the merits, however, questions about Supreme Court decisions that apply the political question doctrine acquire enhanced bite. In particular, why would the Court choose the most extreme underenforcement, by mandating the dismissal of a category of cases due to lack of justiciability, rather than simply reject a claim on the merits ground that no applicable and judicially manageable standard has been violated?¹⁴⁴

¹⁴³ See Sager, *supra* note 4, at 1226 (“On some occasions, institutional concerns result in an announcement that the political question doctrine applies; on others, they produce a decision on the merits which does not do full justice to the invoked constitutional concept.”).

¹⁴⁴ Justice Kennedy's concurring opinion in *Vieth* gives point to this question. Justice Kennedy concluded that the partisan gerrymander before the Court did not violate the Constitution. See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1797 (2004) (Kennedy, J., concurring in the judgment) (asserting that “appellants’ complaint alleges no impermissible use of political classifications and so states no valid claim on which relief may be granted”). He also expressed doubt that any other partisan gerrymanders could be shown to violate the Constitution under standards fit for judicial enforcement. See *id.* at 1792–94. Nevertheless, he preferred to dismiss the suit on the merits, not on grounds of nonjusticiability, based on the possibility that the Court might fashion a standard that would condemn more egregious partisan gerrymanders in a future case. See *id.* at 1794 (concluding that despite “weighty arguments for holding cases like these to be nonjusticiable,” and despite the possibility that those arguments “may prevail in the long run,” the Court should not “foreclose the judicial process from the attempt to define standards and remedies” in future cases). In his plurality opinion, Justice Scalia maintained that Justice Kennedy's proposed approach was not a legally available course of action. Because the trial court found that “the standard for unconstitutionality had not been met,” Justice Scalia wrote that “[i]t is logically impossible to affirm [the dismissal of the case] without either (1) finding that the unconstitutional-districting standard applied by the District Court, or some other standard that it *should* have applied, has not been met, or (2) finding . . . that the claim is nonjusticiable.” *Id.* at 1790 (plurality opinion). As discussed in the text, however, some of the Court's prior decisions suggest otherwise.

*Garcia v. San Antonio Metropolitan Transit Authority*¹⁴⁵ illustrates this alternative approach. *Garcia* involved a challenge to congressional authority under the Commerce Clause to regulate the activities of state and local governments. In a previous case, the Supreme Court had laid out a multipart test for identifying when Congress exceeds its powers under Article I by intruding too far on the prerogatives of state and local governments.¹⁴⁶ But that test had proved “unworkable,”¹⁴⁷ according to the *Garcia* majority, which thought other proposed standards for identifying governmental functions that were off limits to congressional regulation equally difficult to administer.¹⁴⁸ Having rejected several possible tests for identifying “limits on the Federal Government’s power to interfere with state functions,”¹⁴⁹ the Court held that the plaintiffs’ challenge to congressional authority failed on the merits. In doing so, it signaled that future challenges would likely also fail. “[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result,”¹⁵⁰ the Court said. The Court added that “[a]ny substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation.”¹⁵¹

When *Garcia* is compared with *Vieth*, what is perhaps most striking is that the *Garcia* Court, despite having rejected one standard as “unworkable” and despite having crafted no successor, framed its ruling as one on the merits, not as a determination that challenges to congressional regulatory power presented political questions.¹⁵² Although some commentators objected to *Garcia* as a political question ruling in

¹⁴⁵ 469 U.S. 528 (1985).

¹⁴⁶ The earlier case was *National League of Cities v. Usery*, 426 U.S. 833 (1976), the requirements of which were summarized in *Garcia* as having four parts:

First, it is said that the federal statute at issue must regulate “the ‘States as States.’” Second, the statute must “address matters that are indisputably ‘attribute[s] of state sovereignty.’” Third, state compliance with the federal obligation must “directly impair [the States’] ability ‘to structure integral operations in areas of traditional governmental functions.’” Finally, the relation of state and federal interests must not be such that “the nature of the federal interest . . . justifies state submission.”

Garcia, 469 U.S. at 537 (alterations and omission in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 287–88 & n.29 (1981) (quoting *Nat’l League of Cities*, 426 U.S. at 845, 852, 854)).

¹⁴⁷ *Garcia*, 469 U.S. at 546.

¹⁴⁸ *See id.* at 543–47.

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* at 554.

¹⁵¹ *Id.*

¹⁵² *See id.* at 555–57 (finding that the challenged provisions “contravened no affirmative limit on Congress’ power under the Commerce Clause” and adding that “[t]hese cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause”).

disguise,¹⁵³ there is a difference between citing the absence of judicially manageable standards to invoke the political question doctrine and treating the Court's current inability to formulate an applicable and judicially manageable standard as a basis for allowing unspecified latitude to nonjudicial decisionmakers. By applying the political question doctrine, the Court puts a category of cases — some of which may involve violations of constitutional rights — wholly beyond judicial oversight. By contrast, when the Court treats the absence of applicable judicially manageable standards as a ground for rejecting a claim on the merits, it leaves open the possibility that it will develop a judicially manageable standard and recognize a violation in a future case.

The subsequent history of *Garcia* demonstrates this possibility. Although *Garcia* had suggested that generally formulated limitations on congressional power to regulate the states would likely prove “unworkable,” two ensuing decisions have imposed relatively narrow but clear and rule-like restrictions. In *New York v. United States*,¹⁵⁴ the Court held that Congress oversteps its authority when it both singles out the states in their capacity as states and compels them to enact legislation.¹⁵⁵ In *Printz v. United States*,¹⁵⁶ it similarly ruled that Congress lacks power under the Commerce Clause to compel state and local governmental officials to enforce federal law.¹⁵⁷

By applying the political question label, the Court forecloses such developments. It expresses a judgment that future courts, including future Supreme Courts, should have no opportunities to formulate narrow tests of unconstitutionality.¹⁵⁸ In choosing to apply the political

¹⁵³ See, e.g., William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1720–27 (1985) (protesting that the decision ceded to Congress the power to define the boundaries of constitutional federalism and accordingly augured “the piecemeal repeal of judicial review”).

¹⁵⁴ 505 U.S. 144 (1992).

¹⁵⁵ *Id.* at 149.

¹⁵⁶ 521 U.S. 898 (1997).

¹⁵⁷ *Id.* at 935.

¹⁵⁸ The distinction between labeling a category of questions as nonjusticiable and suggesting that governmental power is subject to few if any judicially enforceable limits should not be overstated. Political question rulings are always open to narrowing or even reconsideration. A potential example comes from Guarantee Clause doctrine. U.S. CONST. art. IV, § 4. Several prominent Supreme Court decisions have held that Guarantee Clause cases present nonjusticiable political questions. See, e.g., *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849). In *New York*, however, Justice O'Connor's majority opinion signaled a potential willingness to consider whether the reach of those decisions should be limited. Noting that the Court had ruled on a number of Guarantee Clause cases in the late-nineteenth and early-twentieth centuries “before the holding of *Luther* was elevated into a general rule of nonjusticiability,” *New York*, 505 U.S. at 184, she found that the Guarantee Clause did not plausibly apply to the case before the Court and thus pronounced it unnecessary to resolve the circumstances, if any, under which Guarantee Clause claims should be deemed justiciable, *see id.* at 184–86. Although inconclusive, this discussion held out the plain possibility that the Court might treat some Guarantee Clause claims as justiciable in the future, even if it adhered to the view that oth-

question doctrine, the Court might believe that questions within the affected category are too likely to unsettle judicial judgment and thus to lead a future court to formulate misguided standards. Or the Court might have other reasons falling within what I described earlier as an open-ended category of normative determinants of fitness for adjudication. For example, it might believe that the costs of uncertainty would be intolerably high. In *Nixon v. United States*, the Court thus worried that uncertainty about whether a court would intervene in the case of a presidential impeachment would threaten the nation's political life with potential "chaos."¹⁵⁹

Whatever the precise elements of the cost-benefit calculation in any particular case, this much is clear: by holding a category of cases nonjusticiable, the Court establishes a rule of decision, mandating dismissal, that leaves a constitutional norm completely judicially unenforced and that must count judicial manageability as its principal if not its exclusive virtue.¹⁶⁰

C. *Judicial Manageability and Other Concerns in Doctrinal Design*

Whereas the plurality in *Vieth* could identify no judicially manageable standard at all, other cases may arise in which more than one judicially manageable standard emerges as a candidate for judicial adoption. For example, the Justices of the Supreme Court frequently face choices whether to adopt a rule or a standard, both of which may satisfy the minimal requirements of judicial manageability.¹⁶¹ In other cases the Justices may confront a choice whether to adopt a more or a less stringent judicially manageable test — for example, one that results in overenforcement or another that results in underenforcement of a constitutional provision such as the Equal Protection Clause. In *Vieth*, the plurality felt that it had to choose between underenforcing the norm prohibiting excessive partisanship in gerrymandering, by holding gerrymandering disputes nonjusticiable, or overenforcing the Equal Protection Clause, as it thought that Justice Stevens's proposed

ers are not. On balance, however, a determination of nonjusticiability sends a stronger signal than does a decision on the merits that the courts will refuse to enforce a constitutional norm.

¹⁵⁹ *Nixon v. United States*, 506 U.S. 224, 236 (1993) (quoting *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991)) (internal quotation mark omitted).

¹⁶⁰ Such a ruling would possess an additional virtue if, as some believe, another branch of government would be likely to take its constitutional obligations more seriously if it knows that it will have the last constitutional word on a subject. See Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 55 DUKE L.J. (forthcoming 2005) (manuscript at 5–24, available at <http://ssrn.com/abstract=757964>).

¹⁶¹ See generally Sullivan, *supra* note 53 (discussing occasions for Supreme Court choice between rules and standards).

test would do.¹⁶² In such cases, does and should the Court always adopt the judicially manageable standard that most closely approximates the Constitution's meaning, or can it take other considerations into account?

Although this question does not yield readily to analysis, largely because of the difficulty in specifying exactly what it means for a judicially manageable standard to approximate the Constitution's meaning as closely as possible, the evidence strongly suggests that other considerations matter. Of the two most obvious approaches to measuring proximity to constitutional meaning, one would focus on semantic meaning: it would inquire which form of words, among those satisfying the minimal requirements of judicial manageability, most precisely captures the nuances of pertinent constitutional phraseology as fixed by the conventions of the English language. If this is the appropriate test, it seems plain that courts neither do nor should always prefer implementing formulations that adhere as closely as possible to the Constitution's semantic meaning. In most if not all cases, the best semantic approximation of a vague constitutional guarantee is likely to be a vague judicial standard. Virtually no one, however, believes that courts should always be debarred from developing clear rules to implement vague legal norms, as recurrent discussions about the comparative preferability of rules and standards help to demonstrate. Unless the rules/standards debate is just a debate about whether and when standards satisfy the minimal requirements of judicial manageability, then a central element of the disagreement involves the optimal tradeoff between interests in adhering as closely as possible to semantic meaning and interests in promoting other values, including the value of achieving clear rules for the future.¹⁶³

On another interpretation, the judicially manageable standard that most closely approximates the Constitution's meaning would be that which would produce the greatest possible proportion of correct outcomes (as measured by reference to background constitutional norms) over the total range of cases to be decided by courts.¹⁶⁴ To make sense

¹⁶² See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1785–86 (2004) (plurality opinion) (arguing that racial gerrymanders appropriately trigger strict scrutiny that would be inappropriate for political gerrymanders).

¹⁶³ Justice Scalia has so recognized in advancing the case for judicial articulation of clear rules. “[N]o general principle can achieve a perfect fit” with the meaning of a vague text, he has argued, Scalia, *supra* note 27, at 1183, but “the value of perfection in judicial decisions should not be overrated. . . . [I]t is much better . . . to have a clear, previously enunciated rule that one can point to” in rendering a judicial decision than to have to debate the application of a vague standard. *Id.* at 1178.

¹⁶⁴ Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 563 (6th ed. 2003) (arguing that courts should take error costs into account in framing procedural rules); Strauss, *supra* note 132, at 193 (noting that courts consider “error costs” in establishing doctrinal tests).

of this idea, we must assume that there is a correct answer in every imaginable case that might arise under a constitutional provision and further assume that the provision itself is not a judicially manageable standard. The Court therefore must consider devising doctrinal formulations that give more guidance. If the Court followed an error-minimizing strategy, it would accept that any rule it might adopt — as contrasted with a standard — would be either overinclusive or underinclusive (as measured against the way that cases would ideally be resolved), but it would take into account that a rule would at least yield clear and predictable outcomes. The Court would also assess how often the rule-based decisions would prove correct. As the alternative to formulating a rule, the Court could prescribe a standard-like approach under which an omniscient decisionmaker would decide all cases correctly. In considering how this approach would work in practice, however, the Court would of course need to recognize that no actual decisionmakers possess omniscience. It would therefore need to guess whether actual decisionmakers furnished with a standard would reach the correct outcome more often than actual decisionmakers instructed to apply a particular rule.

Although an error-minimizing strategy is theoretically possible, it seems clear that the Supreme Court neither does nor should follow so simple an approach in fashioning doctrinal tests.¹⁶⁵ First, as nearly everyone would acknowledge, some kinds of errors are more serious than others. The Court may therefore believe it appropriate to craft doctrinal tests not merely to maximize the number of cases that courts decide correctly, but to minimize the number of decisions that occasion severe harm.¹⁶⁶ This consideration appears to dominate in the Court's prescriptions of deference to the military and possibly in its flaccid interpretation of the nondelegation doctrine. The Court wishes to avoid errors that could undermine military discipline¹⁶⁷ or invalidate impor-

¹⁶⁵ See Strauss, *supra* note 132, at 193 (noting that in framing rules, courts routinely “try to strike the optimal balance” among considerations that include but are not limited to minimizing “error costs”); cf. Caminker, *supra* note 133, at 13 (suggesting that courts should “set[] the appropriate level of procedural safeguards” for Fifth Amendment rights by adapting the test of *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), through a balancing of “the strength of the individual’s interest in avoiding wrongful deprivation[,] the value of additional specific safeguards in reducing false-negatives, . . . and . . . the cost to legitimate government interests in providing such additional safeguards”).

¹⁶⁶ See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1661–63 (2005) (discussing how courts weigh “error costs” in shaping constitutional doctrine).

¹⁶⁷ See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (upholding military uniform regulation against a free exercise challenge on the ground that courts are “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have” (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983)) (internal quotation marks omitted)); *Chappell*, 462 U.S. at 304 (denying military personnel a constitutionally based damages remedy against

tant federal programs.¹⁶⁸ Second, clear rules seem less likely than standards to engender litigation.¹⁶⁹ Litigation is costly, and the Court regards the avoidance of litigation as an independent value, probably to be weighed against interests in achieving correct decisions.¹⁷⁰

Although it thus seems clear that judicial choice among judicially manageable tests sometimes depends on considerations other than proximity to constitutional meaning, it is difficult to say much more because courts so seldom talk openly about how they make decisions of this kind.¹⁷¹ I would, however, offer the following speculation. Just as courts ultimately make all-things-considered judgments in determining whether particular proposed tests count as judicially manageable at all, they make substantially open-ended decisions in selecting among those judicially manageable standards that sufficiently approximate the Constitution's meaning to be eligible for adoption. Consider, for example, the decision that the Supreme Court makes in determining whether to subject gender-based discrimination to "strict scrutiny," "intermediate scrutiny," or some other constitutional test.¹⁷² The decision almost inevitably turns partly on empirical assumptions about the relevance of gender to the achievement of significant government objectives and the likelihood that gender-based legislation reflects and re-

their superior officers in view of the "unique disciplinary structure of the Military Establishment and Congress" constitutional authority over the system of military justice); cases cited *supra* note 114.

¹⁶⁸ See, e.g., *Yakus v. United States*, 321 U.S. 414, 426 (1944) (upholding the Emergency Price Control Act against a nondelegation challenge and noting that judicially imposed limitations on congressional flexibility "might well result in serious hardship").

¹⁶⁹ But see Kaplow, *supra* note 53, at 573 n.35 (noting that "the greater predictability of outcomes makes litigation less likely" than settlement under rules, but also noting that lower litigation costs under rules may tend to make litigation more likely under rules than under standards).

¹⁷⁰ See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1781 (2004) (plurality opinion) (rejecting a proposed standard partly on the ground that under it "there is almost *always* room for an election-impeding lawsuit"); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1178 (1996) ("The doctrinal distinction between direct and incidental burdens rests partly on a floodgates concern."); Fallon, *supra* note 44, at 85–86 (citing the Supreme Court's desire to avoid large numbers of lawsuits that are not resolvable under clear rules as a reason for its reluctance to employ "effects tests").

¹⁷¹ See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 98–99 (2005) ("Like most judges, Supreme Court Justices prefer in their opinions to remain on the semantic surface of issues, arguing over the meaning of malleable terms . . . rather than over the consequences of adopting one meaning over another.")

¹⁷² Although the Court propounded an intermediate scrutiny test in *Craig v. Boren*, 429 U.S. 190, 197 (1976), Justice Brennan, who authored the Court's opinion in *Craig*, had argued for the application of strict scrutiny in *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion), but was unable to muster a majority for that formula. The most plausible explanation for Justice Brennan's decision to apply intermediate scrutiny in *Craig* is not that his view of the meaning of the Constitution had changed, but that he felt free to take other considerations into account in adopting a formula to implement the Constitution's meaning. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 1–13 (1998) (discussing strategic elements in the Justices' process of decision in *Craig*).

inforces stereotypes, as well as on an assessment of the anticipated costs and benefits of adjudication under alternative standards. To put the point more bluntly, the Court needs to make practical judgments, not just theoretical ones, and practical judgments almost always require attention to real-world consequences and their costs and benefits.

III. A (PRELIMINARY) RESPONSE TO PRAGMATIC OBJECTIONS

In discussing the importance of judicially manageable standards in merits as well as political question cases, I have linked two theses. First, concerns about judicial manageability influence the design of the doctrinal tests under which courts resolve most cases. Second, a number of constitutional tests either underenforce or overenforce constitutional rights. Although I have maintained that these theses go hand in hand, some who endorse the first reject the second. A school of constitutional pragmatists denies that any useful distinction exists between constitutional rights (or meaning) and the doctrinal tests that courts apply.¹⁷³

The pragmatic approach postulates a tautological relationship between constitutional doctrine and constitutional meaning: constitutional adjudication aims to identify constitutional meaning, and if practical considerations such as judicial manageability influence adjudication, as they do, then they are sources of meaning fully as much as constitutional text and history.¹⁷⁴ According to this view, it is thus misleading to suggest that the meaning of the Equal Protection Clause, for example, can be ascertained without attention to judicially manageable standards. A court that insists upon a judicially manageable doctrinal test does not allow a gap to develop between constitutional

¹⁷³ My use of the term “pragmatist” to characterize this position is admittedly somewhat hazardous, as a number of quite diverse constitutional theories and thinkers either claim to be, or have been characterized as, pragmatist. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240 (1999) (providing a partial list). Accepting the hazard, I shall use the term “pragmatist” to apply to positions that share three elements: first, a denial that it is useful or even meaningful to talk about rights apart from the judicial tests or doctrines through which courts enforce rights; second, an affirmation that doctrine both is and should be shaped in light of practical, instrumental concerns; and third, an insistence that practical, instrumental, and forward-looking considerations are sources of constitutional meaning standing on the same plane as, for example, the language of the Constitution and its original historical understanding. This stipulative definition is informed by, but does not pretend perfectly to reflect, the positions espoused in POSNER, *supra*, at 240–65; Levinson, *supra* note 99; and Roderick M. Hills, Jr., *Exorcizing Anti-Pragmatism from Constitutional Theory* (Mar. 23, 2003) (unpublished manuscript, on file with the Harvard Law School Library).

¹⁷⁴ See Hills, *supra* note 173, at 5 (“The actual doctrine gives remedial and empirical considerations pride of place, such that these concerns shape the scope of rights, and not *vice versa*.”).

meaning and judicial enforcement, but, rather, arrives at a sophisticated understanding of the rights that the Constitution guarantees.¹⁷⁵

Daryl Levinson's article *Rights Essentialism and Remedial Equilibration* exemplifies the pragmatist position. Equating constitutional rights with what earlier philosophical pragmatists might have termed their "cash-value,"¹⁷⁶ Professor Levinson insists that if no judicial enforcement mechanism exists, then no right does either. He thinks it idle and confusing to postulate a constitutional meaning — a "Platonic ideal" — apart from the rights enforced by courts under doctrinal tests.¹⁷⁷

As I hope is clear already, there is much in the pragmatic view with which I agree. Perhaps most important, I agree that forward-looking, empirical, and all-things-considered analyses pervade constitutional adjudication. In this respect, pragmatism furnishes an important corrective to two familiar images of constitutional law. In one, historical inquiries into the original understanding of constitutional language either do or should dominate constitutional adjudication.¹⁷⁸ In another, courts either do or should attend solely to "principle" and exclude all considerations of "policy"¹⁷⁹ as they pursue the best "moral interpretation" of constitutional norms.¹⁸⁰ Against such theories, pragmatism offers a welcome manifesto on behalf of practical judgments, empirical inquiry, and prudence. Indeed, many of my claims would fit comfortably within a pragmatist framework.

Nevertheless, the pragmatists' account of constitutional law seems to me to be unduly reductionist. To begin with an obvious point, the pragmatist framework cannot explain the branch of the political question doctrine involving judicially manageable standards. In *Vieth*, it will be recalled, the plurality assumed that political gerrymanders vio-

¹⁷⁵ See Levinson, *supra* note 99, at 926 (arguing that "rights are perpetually influenced by, and in important respects inseparable from remedies" and that the shape of rights thus "will always be influenced by pragmatic concerns about implementation and enforcement").

¹⁷⁶ See WILLIAM JAMES, *What Pragmatism Means*, in *ESSAYS IN PRAGMATISM* 141, 145 (Alburey Castell ed., 1948) ("You must bring out of each word its practical cash-value, set it at work within the stream of your experience.").

¹⁷⁷ See Levinson, *supra* note 99, at 873 (attacking "[t]he rights-essentialist picture, in which courts begin with the pure, Platonic ideal of a constitutional right and only then pragmatically apply the right through the vehicles of implementation and remediation" on the ground that it "bears little resemblance to the actual judicial practice of rights-construction").

¹⁷⁸ See *infra* pp. 1317–20 (discussing constitutional originalism).

¹⁷⁹ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 69 (1985) ("[T]he Court should make decisions of principle rather than policy . . ."); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82–84 (1977) [hereinafter *DWORKIN, TAKING RIGHTS SERIOUSLY*] (distinguishing principles from policies and contending that judicial decisions should be based on the former, not the latter).

¹⁸⁰ See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7 (1996) (arguing in favor of a "moral reading" of constitutional provisions that are written in moral language and incorporate moral principles into constitutional law).

late the Equal Protection Clause when they go too far but demanded dismissal of the case due to the absence of judicially manageable standards.¹⁸¹ A pragmatist must regard this analysis as nonsense, for pragmatism denies the possibility of rights or constitutional meaning apart from what the courts will enforce. It is possible, of course, that the pragmatists are right and that the *Vieth* dictum ultimately evidences no more than judicial confusion. Nevertheless, there is reason to be skeptical of an account that rejects widely shared assumptions of the legal profession as wholly unsupportable.

The pragmatic position reflects a further reductionism when it insists that the term “rights” should be equated solely with “judicially enforceable rights.” Many constitutional provisions speak in the first instance to officials other than judges.¹⁸² Within our constitutional practice, courts often have oversight responsibilities, but there is no reason to think that the meaning of provisions establishing official duties always ceases where judicial superintendence leaves off. To return to an example offered above,¹⁸³ courts will sometimes reject due process challenges to administrative decisions as long as those decisions are supported by “some evidence,” but that minimal standard of review surely does not define the constitutional duty of administrative decisionmakers. Sensibly construed, the Due Process Clause requires officials charged with decisionmaking responsibility to follow fair procedures and then to deliberate impartially, not just to avoid decisions that are wholly unsupported by evidence.

In equating rights exclusively with the rights that courts will enforce, pragmatists also make it unintelligible for courts to deliberate about how a constitutional right or guarantee would *best* be implemented (because, on the pragmatist’s analysis, the remedies define the right). Nor, relatedly, would the pragmatist’s framework let us compare one proposed constitutional test the likely “error costs” of which would consist of false negatives — failures to find a constitutional guarantee applicable when one in fact applies — with another proposed rule more likely to generate false positives.¹⁸⁴ Once again, the

¹⁸¹ See *supra* p. 1276.

¹⁸² For example, the First Amendment begins “Congress shall make no law,” U.S. CONST. amend. I (emphasis added), and the second sentence of the Fourteenth Amendment says that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” U.S. CONST. amend. XIV, § 1 (emphasis added).

¹⁸³ See *supra* pp. 1299–1300.

¹⁸⁴ Calculations of this sort are common in the work of social scientists, who denominate as “type I errors” decisions that err by failing to recognize that an underlying norm actually applies to a case and as “type II errors” decisions that erroneously find underlying norms to apply when in fact they do not. See, e.g., ROBERT S. WITTE & JOHN S. WITTE, *STATISTICS* 260 (6th ed. 2001).

pragmatist must deny the possibility of right answers to constitutional questions, and thus the possibility of false positives and false negatives, apart from the tests that courts apply to resolve litigated cases. If comparison of tests based on the likelihood of false positives and false negatives is intelligible at all — for example, in thinking about whether the *Miranda* rule is a good one — then the pragmatist is wrong to mock notions of rights (as “Platonic essences”) apart from judicial remedies. Or, to put the point slightly differently, the pragmatist offers no adequate reason for us to deny ourselves the conceptual resources to engage in analyses of this kind.

In claiming that some doctrinal tests under- or overenforce the Constitution, I acknowledge that it is often difficult to identify when in constitutional analysis the search for meaning leaves off and the development of judicially manageable standards begins. Courts do not customarily divide their analyses into two parts, one involving constitutional meaning and the other doctrinal design. More typically, courts reason seamlessly to their conclusions. But the failure of courts explicitly to bifurcate their analyses hardly demonstrates that no useful distinction exists between inquiries into constitutional meaning and the construction of doctrinal tests. To the contrary, the notion of a permissible gap between meaning and doctrine helps to explain why courts need not always attempt to state the Constitution’s meaning with maximal precision before articulating a rule of decision. To repeat a phrase that I used earlier, if close enough to constitutional meaning is good enough, then there is often no need for courts to attempt to discern precisely what the Constitution means, or what its implications would ideally be for every imaginable case, before laying down an implementing test.

Against arguments of this kind, pragmatists may register a final, skeptical protest that at least for those who are not judges, the “essentialist” thesis would serve a useful purpose if, but only if, we could “reverse-engineer”¹⁸⁵ from judicial doctrines — which are real, palpable, and observable — to the “Platonic ideals” that such doctrines implement. If such reverse engineering is impossible, pragmatists believe, no practical good can come from positing rights distinct from their doctrinal shadows, and we could both simplify and sharpen our thinking by focusing exclusively on the judicially enforceable rights that ultimately are the only things that really matter.

I see no reason, however, why reverse engineering should be the test for whether recognizing a distinction between constitutional meaning and implementing doctrine helps to illuminate constitutional law.

¹⁸⁵ My colleague Daryl Levinson expressed this way of framing the pragmatist concern to me in a characteristically incisive e-mail message.

As I have insisted repeatedly now (following Larry Sager on this point), some payoff comes in recognizing that judicial doctrine does not always define the obligations of nonjudicial officials. If such officials proceed in good faith, they may acknowledge that they have broader constitutional obligations — as in *Vieth* or the “some evidence” cases — than the courts would enforce. But sometimes, too, enhanced insight is its own reward. If we look at constitutional law with the distinction between meaning and doctrine in mind — as the notion of judicially manageable standards invites us to do — then a number of issues and phenomena will appear in fresh and occasionally provocative perspectives. Or so, at any rate, I shall now attempt to show.

IV. “THE PERMISSIBLE DISPARITY THESIS” AND ITS IMPLICATIONS

I shall henceforth refer to the claim that a gap frequently exists between constitutional meaning and judicially enforced doctrine, often triggered by the demand for judicially manageable standards and occasionally resulting from other considerations as well, as “the permissible disparity thesis.” Recognition that there can be permissible disparities between constitutional meaning and implementing doctrine should spur reconsideration of leading constitutional theories, most of which concern themselves entirely with constitutional meaning and ignore issues involving the design and enforcement of constitutional doctrine. The permissible disparity thesis also raises frequently overlooked issues about the judicial role in constitutional adjudication and about the attributes needed for Supreme Court Justices to perform that role adeptly. In a final, bracing, jurisprudential twist, the permissible disparity thesis should provoke a reassessment of the nature of constitutional rights, especially those that the courts justifiably leave either unenforced or underenforced.

A. *The Nature and Significance of Constitutional Theories*

The permissible disparity thesis invites a fresh appraisal of the nature and ambitions of leading constitutional theories, notably including originalism — the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning.¹⁸⁶ Despite large apparent differences between

¹⁸⁶ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–46 (1990); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1128–31 (2003); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 38–47 (Amy Gutmann ed., 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849,

originalism and nonoriginalist theories, originalist and nonoriginalist judges converge in their decisions surprisingly often.¹⁸⁷ Given the strident debates among constitutional theorists, one well might wonder how so much agreement could eventuate. The reason, I would suggest, is that what we call constitutional theories or theories of constitutional interpretation are often theories about constitutional meaning that implicitly accept the permissibility of a disparity between constitutional meaning and implementing doctrine. If constitutional theories fix the meaning of the Constitution, but stipulate that implementing doctrines sometimes permissibly diverge from it, then such theories are less complete and thus less practically significant than their proponents suggest. Occasional pretensions to the contrary notwithstanding, they are not necessarily theories of how constitutional cases ought ultimately to be decided once the permissibility of gaps between constitutional meaning and implementing doctrine is acknowledged.

Originalism illustrates the distinction between a theory of meaning and a theory of adjudication. Originalists often boast that their theory binds judges to an unchanging rule of law and thereby diminishes subjective decisionmaking.¹⁸⁸ Because the permissible disparity thesis acknowledges a judicial authority to escape the bonds that originalism claims to impose, and to do so pursuant to standards that are substantially indeterminate, one might expect originalists to reject it. Yet most originalists apparently do not. An implied recognition of the permissible disparity between constitutional meaning and implementing doctrine emerges from the position of Justice Scalia, a self-proclaimed originalist, that courts should eschew vague standards and instead adopt clear rules.¹⁸⁹ In defending this position, Justice Scalia has not insisted that most constitutional guarantees simply *are* rules or even that the Constitution's framers and ratifiers understood them as such. He maintains instead that "courts have the capacity to 'make' law,"¹⁹⁰ that they do so by formulating rules or standards,¹⁹¹ and that judges

862 (1989) [hereinafter Scalia, *Originalism*]; Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996).

¹⁸⁷ See Scalia, *Originalism*, *supra* note 186, at 862 (arguing that "the fact that most originalists are faint-hearted and most nonoriginalists are moderate . . . accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions"); see also Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1602–03 (1989) (contending that "theoretically, there is no real distinction between originalism and nonoriginalism" and that "as a matter of practice, self-professed distinctions between originalists and nonoriginalists are even more dubious").

¹⁸⁸ See, e.g., BORK, *supra* note 186, at 1–5, 143–46, 154–55; Scalia, *Originalism*, *supra* note 186, at 854, 862–63.

¹⁸⁹ See Scalia, *supra* note 27, at 1187 (arguing that, "where possible," totality-of-the-circumstances tests should "be avoided" and clear rules adopted).

¹⁹⁰ *Id.* at 1177.

¹⁹¹ See *id.* at 1179–80.

should adopt rule-like doctrines as a means of enforcing constitutional meaning because of the benefits of doing so.¹⁹²

Originalist law professor Randy Barnett adopts a similar stance. According to Professor Barnett, the original public meaning of constitutional provisions is often very general and thus leaves judges “considerable discretion in developing legal doctrines.”¹⁹³ He adds that “[t]his activity of applying meaning to cases by means of intermediary doctrines is better described as constitutional *construction*, rather than as interpretation of text.”¹⁹⁴

An even more important acknowledgment of a permissible gap between constitutional meaning and constitutional doctrine inheres in many originalists’ acceptance of *stare decisis*.¹⁹⁵ In common with most originalists,¹⁹⁶ Justice Scalia professes that courts should sometimes adhere to past decisions that depart from the original understanding.¹⁹⁷ Although he has termed *stare decisis* an “exception” to his constitutional theory, not an aspect of it,¹⁹⁸ as a practical matter the exception seems as important as the theory itself.¹⁹⁹ In any event, the larger the role that originalists accord to *stare decisis*, the greater the

¹⁹² See *id.* at 1178–80 (outlining the advantages of rules over standards); see also BORK, *supra* note 186, at 162–63 (arguing that the originalist methodology will often yield only principles or major premises that judges must then apply).

¹⁹³ Randy E. Barnett, *Was the Right To Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 240 (2004) (book review).

¹⁹⁴ *Id.*; see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–30 (2004) (explaining the distinction between interpretation and construction).

¹⁹⁵ See, e.g., Antonin Scalia, *Response, in A MATTER OF INTERPRETATION*, *supra* note 186, at 129, 139–40. The doctrine takes its name from the Latin maxim “*stare decisis et non quieta movere* — stand by the thing decided and do not disturb the calm.” James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986). For discussions of *stare decisis*, see, for example, Alexander, *supra* note 10; Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Paulsen, *supra* note 10; and Schauer, *supra* note 10.

¹⁹⁶ See, e.g., BORK, *supra* note 186, at 155–59 (acknowledging a role for *stare decisis* in constitutional adjudication). *But see* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994) (arguing that the Constitution forbids courts to decide cases on the basis of erroneous past decisions).

¹⁹⁷ See Scalia, *supra* note 195, at 139–40.

¹⁹⁸ *Id.* at 140 (“[S]tare decisis is not *part* of my originalist philosophy; it is a pragmatic *exception* to it.”).

¹⁹⁹ Among the holdings that would be thrown into doubt if *stare decisis* were abandoned are those establishing that the Bill of Rights applies to the states, that equal protection norms apply to the federal government, that the Fourteenth Amendment creates a one-person, one-vote requirement, and that the Due Process Clause imposes a requirement of substantive fairness. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–13 (1975).

need for them to acknowledge a permissible disparity between constitutional meaning and implementing doctrine.

Other constitutional theories invite a similar analysis. Consider, for example, theories that equate the meaning of constitutional provisions that employ moral concepts with standards of objective moral right.²⁰⁰ Insofar as the proponents of such theories acknowledge the need to accommodate judicial precedents or other settled practices that they think incompatible with the best moral interpretation of constitutional norms, they signal that their theories are theories of constitutional meaning, not complete theories of adjudication.²⁰¹

Accommodations of precedent and practice aside, if the Constitution incorporates abstract moral principles, then those principles would frequently require implementation through more sharply etched doctrinal formulations. As I noted above, virtually all legal and moral rules — including the rules embodied in constitutional doctrine — are “entrenched generalizations” that either overenforce or underenforce the values that they are crafted to serve.²⁰² Any theory that both equates constitutional meaning with abstract moral principles and also accepts a significant role for rule-like doctrinal tests must therefore acknowledge a permissible gap between constitutional meaning and implementing doctrine.

As I hope is clear, these comments neither disparage theories of constitutional meaning nor deny their importance. Adjudication, including the formulation of doctrinal tests, should always occur in light of constitutional meaning. Nevertheless, constitutional adjudication neither does nor should turn wholly on inquiries into what the Constitution means. Considerations such as those illumined by the demand for judicially manageable standards also play a vital, occasionally supervening role.

²⁰⁰ See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5, 304–05 (1985) (advocating a “natural law” interpretation of the Takings Clause); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) (arguing that legal interpretation should reflect moral rights); see also DWORKIN, *supra* note 180, at 7–9 (observing that many constitutional provisions “refer to abstract moral principles” and thus incorporate those abstract moral principles, rather than the framers’ and ratifiers’ understanding of how those principles would be applied, into the Constitution).

²⁰¹ See, e.g., EPSTEIN, *supra* note 200, at 324–29 (discussing impediments to judicial invalidation of long-established programs that have generated reliance interests). By contrast, Michael Moore advances his “natural law theory of interpretation,” see Moore, *supra* note 200, as a complete theory of adjudication: he attempts to prescribe how judges should ultimately decide cases after taking precedent, as well as a “moral realist” interpretation of constitutional language, into account. See *id.* at 371–76.

²⁰² See SCHAUER, *supra* note 32, at 43–52.

B. The Nature of the Judicial Role and Judicial Qualifications

Frank recognition of the judicial function in crafting and choosing among judicially manageable standards triggers questions about judicial power and competence that have not received much helpful study.²⁰³ At least two such steps need to be distinguished: a determination of relevant background facts and a weighing of costs and benefits.

In innumerable ways, both judgments of judicial manageability and judicial selections among standards that would pass muster as judicially manageable depend on assumptions about human psychology, about the forces that shape institutional sociology, about the phenomenology of deprivation and threat, about likely individual and institutional responses to legal incentives, and much more.²⁰⁴ Although vital to judicial decisionmaking, assumptions about pertinent background facts frequently go unexamined, both in legal argument and in court opinions.²⁰⁵ Occasionally the Supreme Court notes its lack of relevant knowledge and crafts standards with this deficit in mind — for example, in cases involving prisons and the military.²⁰⁶ More often, however, it forges ahead.²⁰⁷ Questions about the empirical predicates for constitutional analysis cry out for further examination.

As I have suggested repeatedly, the second step in gauging judicial manageability involves a weighing of costs and benefits, and similar assessments may drive selections among proposed tests if more than

²⁰³ There are of course exceptions. See, e.g., Caminker, *supra* note 133, at 6–20 (highlighting the role of prediction and cost-benefit analyses in doctrinal design); Levinson, *supra* note 99, at 873–913 (emphasizing the importance of concerns about remedies in the definition of substantive rights); Strauss, *supra* note 132 (maintaining that constitutional doctrines are frequently designed in light of practical and instrumental considerations).

²⁰⁴ See, e.g., David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 547–49 (1991) (arguing that judicial assumptions about background facts play a pervasive role in constitutional law); Levinson, *supra* note 99, at 930 (arguing that the design of remedies depends on empirical and pragmatic questions).

²⁰⁵ See, e.g., Faigman, *supra* note 204, at 612 (noting that traditionally the courts have manipulated the facts to achieve a desired outcome); Wendy M. Rogovin, *The Politics of Facts: “The Illusion of Certainty”*, 46 HASTINGS L.J. 1723, 1729–31 (1995) (analyzing the use of facts in judicial review); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 179–202 (2003) (examining and critiquing courts’ increasing reliance on empiricism in constitutional cases).

²⁰⁶ See *supra* pp. 1300–02.

²⁰⁷ For example, Daryl Levinson has argued that both courts and commentators have recurrently misunderstood the characteristic motives of public officials and, in particular, have overestimated their likely response to threats of damages to be paid from the public treasury. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 964–68 (2005); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348–61 (2000). In his view, courts have gone awry by designing both substantive and remedial doctrines on the basis of faulty assumptions. See *id.*

one would qualify as judicially manageable and sufficiently approximate constitutional meaning. Regrettably, however, we know almost nothing about how courts perform analyses of this kind for the simple reason that they choose to reveal almost nothing.²⁰⁸ The opacity ought to rankle. There would be little cause for concern if the judicial role in devising and choosing among judicially manageable standards were a matter of small moment, but there is no reason to believe that it is. In thinking about judicial power and its proper limits, we should direct less attention to debates about constitutional meaning and more to the inherently value-based judgments that underlie judicial design of and selection among judicially manageable standards.

Among other benefits, focus on this aspect of the judicial function would call attention to the broad range of qualities that matter in assessing candidates for judicial office. Not all of the relevant traits are distinctively legal or analytical. On the contrary, in crafting and evaluating rules of decision, judges and Justices must frequently make important decisions about what is ultimately worthwhile or justifiable, all things considered, after all of the linguistic, historical, and technical analysis is done. Among the pertinent intellectual attributes are these:

- * Knowledge and assumptions about human psychology and about the sociology of diverse institutions, including business organizations, the military, police forces, educational institutions, municipal boards, and government bureaucracies;

- * Factual knowledge about the myriad contexts for which legal rules must be fashioned and in light of which their success or failure should be judged;

- * Confidence or lack of confidence in the capacity of instrumental human reason, as wielded by judges and others, to anticipate and manage the ripple as well as the primary intended effects of ambitious doctrinal innovations; and

- * Sensitivity to and disposition to be influenced by particular competing values in making all-things-considered judgments.

Technical acumen and interpretive philosophies surely matter, but the requirements of good judging extend much more broadly.

C. The Nature and Significance of Constitutional Rights

In a more jurisprudential vein, the permissible disparity thesis requires recognition of at least two importantly different types of constitutional rights, one associated with constitutional meaning and the other with implementing doctrines. Because constitutional meaning often stands in the background of constitutional adjudication, with the

²⁰⁸ See Posner, *supra* note 171, at 98 (noting that it is “typical” for courts not to articulate pragmatic justifications for their rulings because “[they] do not sound very lawlike”).

tests that define judicially enforceable rights occupying the foreground, I shall refer to rights that directly reflect the Constitution's meaning as background rights.²⁰⁹ The other category, which I shall call doctrinal rights, consists of rights that courts will enforce under judicially formulated tests. The juxtaposition of background and doctrinal rights — with the gulf between them arising from the demand for judicially manageable standards and from the need for courts sometimes to choose among judicially manageable standards — raises illuminating questions about the nature of background rights. It also challenges us to develop better theories about which disparities between background and doctrinal rights are acceptable and which are not.

1. *Background Rights.* — Among the most fundamental questions provoked by the permissible disparity thesis is this: what do we need to assume about background rights for a gap between background rights and doctrinal rights to be constitutionally acceptable? A traditional answer says little beyond the obvious: many background norms are too vague to permit application until they have been further specified, and it is therefore an inevitable, historically contemplated judicial function to develop doctrines giving concrete meaning to otherwise indeterminate provisions.²¹⁰ This assumption seems indisputably correct. The problem lies not in its falsity but in its inadequacy to explain the nature of the gap that often exists between constitutional meaning and doctrinally enforceable rights. In withholding judicial enforcement in the absence of judicially manageable standards, courts do not merely specify the meaning of abstract norms, but often decide to allow disparities between meaning and doctrine to develop, sometimes based on anticipated costs and benefits.

Larry Sager has advanced a spare but elegant thesis to explain how background rights could be rights in a meaningful sense even if courts do not enforce them to their full conceptual limits: background rights should bind the consciences of nonjudicial officials.²¹¹ This claim is generally persuasive as far as it goes, as I emphasized in Part III, but it also requires an important qualification not noted by Sager.

Although the underenforcement of rights by the judiciary does not absolve nonjudicial officials of their constitutional obligations, in my view nonjudicial officials are as entitled as judges to take what Sager calls “institutional concerns” into account in determining their en-

²⁰⁹ This vocabulary is adapted from DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 179, which distinguishes “between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution.” *Id.* at 93.

²¹⁰ See Monaghan, *supra* note 125, at 22–23 (terming “the power and the duty to fashion ‘interpretative’ implementing rules to fill out the meaning of generally framed constitutional provisions . . . simply an ancient aspect of the judicial function in construing the meaning of any text”).

²¹¹ See Sager, *supra* note 4, at 1221, 1227.

forcement responsibilities.²¹² Somewhat more pointedly, if institutional concerns can justify judicial underenforcement of background rights, there may also be circumstances in which institutional considerations — varying with the institution in question — might sometimes warrant constitutional underenforcement by nonjudicial officials too. If, for example, a court can take practical costs into account in not fully enforcing the constitutional norm forbidding Congress to delegate its legislative powers, then I see no reason why a member of Congress, if unable otherwise to amend the substantive content of an important bill to be voted up or down, should not make similar calculations. Just as courts can accord significance to practical incapacities, individual legislators, lacking power to revive a constitutional norm from desuetude or even to focus meaningful attention on the issue, could determine for “institutional” reasons that they have no obligation to behave quixotically.

Consider, too, the situation of the President or other high officials charged with implementing judicially underenforced constitutional guarantees in military or prison contexts. The effective administration of a large bureaucracy requires the promulgation of rules, and executive officials should be as entitled as courts to take considerations of “manageability” into account in issuing directives — to be administered by others — that could lead to constitutional underenforcement in some cases. To express the point in the now familiar vocabulary of social science, executive officials should be as entitled as courts to weigh the risks and costs of “type I errors,” involving false negatives, against those of “type II errors,” reflecting false positives,²¹³ in designing a scheme to implement constitutional values. If this premise is granted, and if the balance can ever permissibly be struck in favor of a rule that permits any false negatives (or underenforcement) at all, then background rights may exist without any government official being conscience-bound to enforce them to their full conceptual limits.

If a constitutionally permissible gap can exist between background rights and the rights that courts or other officials will currently enforce, the best rationalizing explanation may be that background rights can be (though not all of them need to be) partly aspirational,²¹⁴ em-

²¹² *Id.* at 1218.

²¹³ See *supra* note 184 and accompanying text.

²¹⁴ See WALTER MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 428 (3d ed. 2003) (arguing that constitutional interpreters must be both pragmatic — ready to “moderat[e] or delay[] the pursuit of ideal ends when the costs of their pursuit are too high” — and aspirational, by “structur[ing] constitutional interpretation” around those ideal ends); Laurence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 186, at 65, 87–88 (characterizing some constitutional provisions as aspirational); see also Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 99–100 (2004) (asserting that “an interpreter of the Constitution must be imbued with a sense of prudence and of aspiration at the same time”);

bodying ideals that do not command complete and immediate enforcement. The notion of an aspirational right is admittedly elusive, at least within the context of the American legal system.²¹⁵ Nonetheless, recognition that rights may go wholly or partly unenforced due to an absence of judicially manageable standards, as argued in Parts I and II, should occasion sympathetic consideration.²¹⁶

An example that may help to focus thought about aspirational rights comes from Alexander Bickel's famous article on the legislative history of the Fourteenth Amendment.²¹⁷ In essence, Bickel sought to justify the Supreme Court's ruling in *Brown v. Board of Education*,²¹⁸ notwithstanding evidence that the Fourteenth Amendment was not originally understood to require immediate school desegregation.²¹⁹ In defending *Brown*, Bickel advanced two related points. First, Congress had chosen and the states had ratified highly general language.²²⁰ Second, Bickel found specific evidence that the Equal Protection Clause embodied a compromise between congressional moderates and idealists. The moderates insisted on being able to deny that the Fourteenth Amendment would force an immediate end to segregation.²²¹ For their part, the idealists sought, and the moderates agreed to, lan-

Philip Harvey, *Aspirational Law*, 52 BUFF. L. REV. 701 (2004) (developing the category of "aspirational law" to characterize rights that nations ratifying the International Covenant on Economic, Social and Cultural Rights pledge to work toward realizing, but not necessarily to realize immediately).

²¹⁵ The idea of aspirational rights might cohere more comfortably with constitutional regimes that expressly make some rights, prominently including social and economic rights, judicially unenforceable. See, e.g., Frank I. Michelman, *What (If Anything) Is Progressive-Liberal Democratic Constitutionalism?*, 4 WIDENER L. SYMP. J. 181, 199 (1999) (arguing that judicially unenforceable rights can have salience in "some political cultures" but acknowledging that America may not be such a culture); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1901 (2004) (maintaining that nonjusticiable social welfare rights may have political relevance in societies with "entrenched democratic cultures — where civil society stands ready to inflict political damage to legislators who depart from the constitution's requirements — and advanced welfare states").

²¹⁶ Cf. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 556 (1997) (arguing for a right to work but acknowledging its judicial unenforceability in light of the difficulty in devising manageable standards).

²¹⁷ See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

²¹⁸ 347 U.S. 483 (1954).

²¹⁹ See Bickel, *supra* note 217, at 59 ("If the fourteenth amendment were a statute, a court might very well hold . . . that it was foreclosed from applying it to segregation in public schools. The evidence of congressional purpose is as clear as such evidence is likely to be . . .").

²²⁰ See *id.* at 60 (noting that Section 1 of the Fourteenth Amendment pertains to discrimination generally, not only racial discrimination, and concluding that "the fact that the . . . amendment was couched in . . . general terms could not have escaped those who voted for it").

²²¹ See *id.* at 62 (noting that the moderates sought to "defend themselves against charges" that the amendment would bring about social equality).

guage that “was sufficiently elastic to permit reasonable future advances.”²²²

Although Professor Bickel placed heavy weight on the framers’ intent, his insight that constitutional language can embody aspirations that do not always require immediate enforcement, yet invite “reasonable future advances,” could apply in other circumstances and in light of other considerations. Of the routes that converge on this conclusion, two stand out. One begins with the assumption that some constitutional provisions reflect moral ideals.²²³ A person might hold this view yet believe that the judiciary should not attempt to realize the full conceptual meaning of some ideals until the public sufficiently accords with its judgments. A person might think, for example, that constitutional doctrines are unlikely to survive in the long run if they diverge too far from prevailing public values. Alternatively, a person might believe that the original understanding of constitutional language establishes aspirations to which the polity should strive to adhere, but subject to reasonable exceptions when the costs of adherence would prove too high. One exception might involve the doctrine of *stare decisis*, for which most originalists make practical allowance.²²⁴ More generally, Justice Scalia has suggested that many originalists might prove understandably “fainthearted” if the costs of enforcing their doctrine grew exorbitant in particular cases.²²⁵

From one perspective, acceptance that judicial doctrines may sometimes settle for approximations of background rights or permit the compromise of constitutional ideals may appear dispiriting. From another perspective, however, it is the alternative view that would diminish the Constitution by draining it of aspirational content. Among the benefits of viewing some background rights as partly aspirational, two loom especially large. First, acknowledging that background rights exist independently of doctrinal rights helps to sustain an understanding of the Constitution that is sufficiently capacious for nearly everyone’s dreams.²²⁶ We can agree that the Constitution embodies large aspira-

²²² *Id.* at 61.

²²³ Cf. DWORKIN, *supra* note 180, at 7 (advocating a “moral reading” of constitutional provisions that “refer to abstract moral principles and incorporate these by reference, as limits on government’s power”).

²²⁴ See *supra* pp. 1319–20.

²²⁵ Scalia, *Originalism*, *supra* note 186, at 863 (acknowledging that “originalism is strong medicine” and that “one cannot realistically expect judges . . . to apply it without a trace of constitutional perfectionism”).

²²⁶ See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9, 25 (1983) (noting that many people experience the law as “part and parcel of a complex normative world” and “establish their own meanings for constitutional principles”); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 28 (2003) (arguing that “[d]isputes about the

tions and deserves our allegiance partly because it does so without our also needing to agree on what those aspirations are. Second, acknowledgment that a gap can permissibly exist between partly aspirational background rights and judicially enforceable doctrinal rights accommodates the need that nearly everyone feels for practical, sometimes pragmatic compromises in constitutional law — a subject to which I shall return shortly.

2. *Doctrinal Rights.* — If constitutional rights can be partly aspirational, an important question concerns the permissible grounds for leaving constitutional aspirations unrealized. This question could be understood as descriptive: when do courts regard it as permissible to allow gaps to develop between constitutional aspirations and implementing doctrine? Or it could be construed as normative, concerning the approach that courts ought to follow. At this point I must acknowledge that I have no crisp, definitive answer to either the descriptive or the normative question. I do, however, have a few observations that may operate as a spur to further thought and research.

With respect to current judicial practice, three bodies of doctrine stand as plain candidates for investigation. One involves constitutional remedies. As is well known, doctrines of sovereign and official immunity commonly limit the remedies for constitutional violations and occasionally leave victims with no effective remedy at all.²²⁷ These doctrines have important affinities with equitable canons that permit courts to frame or withhold injunctive remedies in light of a balance of public and private interests. The most famous balancing by the Supreme Court came in *Brown v. Board of Education (Brown II)*,²²⁸ in which the Court affirmed the right to freedom from race-based segregation that *Brown I* had recognized but tolerated enforcement delays under the “all deliberate speed” formula.²²⁹ By affirming a right but limiting available remedies, a court may treat a right as partly aspirational, especially insofar as it anticipates that other, non-judicial officials are unlikely fully to vindicate the right immediately.

Another doctrine that might help to illuminate the partly aspirational character of constitutional rights is stare decisis. The principal bite of stare decisis occurs when it directs courts to reach results con-

Constitution often raise deep questions of social meaning and collective identity” and that settling disputes is not the Constitution’s sole function).

²²⁷ For explorations of remedial doctrines that allow a gap to develop between rights and remedies, see, for example, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); and John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999). See also Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589–609 (1983) (discussing grounds for the withholding of equitable remedies).

²²⁸ 349 U.S. 294 (1955).

²²⁹ *Id.* at 301.

trary to what they would otherwise regard as mandated by the Constitution.²³⁰ At least some cases decided under *stare decisis* may therefore depart from constitutional aspirations. The Supreme Court has said repeatedly that *stare decisis* is a policy of prudence, not a constitutional mandate,²³¹ but there is more work to be done to determine when the Court applies the policy and when it does not.

A third candidate for further research involves judicially manageable standards and the questions to which the demand for judicially manageable standards gives rise. For example, what considerations determine judicial choice among judicially manageable standards when more than one is available to implement a constitutional norm? My efforts in this Article only scratch the surface.

If cast in normative terms, the question about permissible grounds for courts to allow gaps between background rights and doctrinal rights remains daunting. An adequate answer would require an overall theory of constitutional adjudication that not only provides an account of constitutional meaning, but also deals with practical implementation. Lacking such a theory, I would offer only one tentative thought that may be worth venturing because of its connection with ideas currently being discussed under the heading of “popular constitutionalism” — a loose label linking diverse claims that constitutional law appropriately reflects public opinion.²³²

In thinking about grounds for the permissible underenforcement of background rights, many of the hardest questions revolve around public acceptability. As I noted above, the Supreme Court sometimes invokes considerations of public acceptability in assessing whether a proposed test or standard qualifies as judicially manageable.²³³ I would now echo familiar speculations that similar concerns influence judicial decisions about which judicially manageable rule to choose in

²³⁰ See sources cited *supra* note 10.

²³¹ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (affirming that “*stare decisis* is not an inexorable command” but requires only that “a departure from precedent . . . be supported by some ‘special justification’” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)); *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)) (internal quotation marks omitted).

²³² Among the lines of thought sometimes subsumed under the rubric of popular constitutionalism are those expressing skepticism about the normative desirability of retaining judicial review at all, see, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999), those calling for a “departmental” approach in which other departments of government feel entitled to act on their own understandings of the Constitution, not those advanced by the judicial branch, see, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 106–11, 252–53 (2004), and those calling for greater judicial responsiveness to the moral values animating mass political movements and defending an expanded conception of congressional power to enforce the Constitution under Section 5 of the Fourteenth Amendment, see, e.g., Post & Siegel, *supra* note 226.

²³³ See *supra* pp. 1294–95. For a lucid discussion with which I am in general agreement, see Gewirtz, *supra* note 227, at 674–80.

cases of high public salience. Advancing one step further, I would venture that it is normatively appropriate for courts to take public acceptability into account in this way, at least when the immediate enforcement of a background right would likely occasion long-term damage to the interests of the rightholders.

To take a concrete example, suppose a current majority of the Justices believed that the Constitution, properly interpreted, includes a background right to gay marriage. Suppose further that the Justices constituting that majority believed that recognizing a current right to gay marriage would trigger a backlash against the cause of gay rights, harming the interests of most homosexuals and likely leading to a constitutional amendment prohibiting gay marriage. Under these circumstances, the Supreme Court should decline to adopt a rule of decision enforcing the background right.²³⁴

Admittedly, this is a potentially dangerous form of argument. If instrumental and prudential assessments permissibly influence one case, it is not obvious why they should not influence others. For instance, suppose that a current majority of the Justices believed that dramatic expansions (or contractions) would be necessary to bring doctrinal rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments into close alignment with background rights. Suppose further that the same Justices recognized that simultaneous dramatic changes along all of these fronts would generate angry opposition among a majority of the American public — which would view the Court as irresponsibly activist (or reactionary) — and lead to steps by the political branches either to curb judicial power or to alter the Supreme Court's political balance so that its doctrinal innovations would be reversed. On this basis, would the Court be justified in staying its hand in some or all doctrinal areas? In determining that it should move immediately to align doctrinal rights with background rights only in contexts in which the current gap was larger or more disturbing than in others?

Once again, I am inclined to say yes. For reasons famously argued by Professor Dworkin, doctrinal rights ought to be treated as “trumps” in legal argument.²³⁵ It would be intolerable for a court to refuse to enforce an existing doctrinal right — in a case involving an unpopular defendant, for example — in order to avoid a furor. If prudential considerations could override doctrinal rights on an ad hoc basis, the notion of a constitutional right would lose nearly all meaning. But back-

²³⁴ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 161 (1999) (asserting that “[a]ny Court should hesitate in the face of” foreseeable adverse reactions to a decision upholding a right to gay marriage that would likely include “an intensifying of hatred of homosexuals, a constitutional amendment overturning the Court’s decision, and much more”).

²³⁵ See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 179, at xi.

ground rights are importantly different from doctrinal rights, and they need not function as trumps in the same way. If background rights are appropriately treated as aspirational, it is because there can be reasonable disagreement about how they should be defined and enforced, and their full realization cannot, and perhaps should not, occur immediately. If we are prepared to recognize that the Constitution includes aspirational rights at all, it would seem self-defeating to insist that courts should proceed in ways that would frustrate, rather than promote, the long-term achievement of constitutional aspirations.

This suggestion again invites objections. Relative to other branches of government, courts may be poorly equipped to take public values into account.²³⁶ Certainly it is part of their job to be counter-majoritarian in some instances. In addition, acknowledgment that courts attend to public opinion might undermine public confidence in their ability to enforce doctrinal rights disinterestedly and thus to satisfy a core requirement of the rule of law.²³⁷ Despite their potency, these objections capture only one aspect of a complex reality. In an age in which we are all “realists” about the judicial role, at least in some moods and for some purposes,²³⁸ an almost inescapable duality may pervade our thinking about constitutional adjudication. Sometimes we view courts, especially the Supreme Court, as necessarily making all-things-considered judgments about costs and benefits, about public acceptability, and about what would be morally better or worse. In other frames of mind, we cling to an image of courts as institutions with an obligation to apply the law disinterestedly, not to temper or adapt it, and to do so without regard to public sentiments. Perhaps, I want to suggest, we can reasonably ask courts to play both roles. Perhaps they can play the former role in determining how far constitutional aspirations should be embodied in current, judicially enforceable doctrine. Perhaps they should play the latter in enforcing doctrinal rights. These two roles undoubtedly blend in hard cases testing the reach of established doctrinal rights.²³⁹ But maybe there is enough of a distinction to support or at least explain a familiar duality

²³⁶ Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“Instead of engaging in the hopeless task of predicting public perception — a job not for lawyers but for political campaign managers — the Justices should do what is *legally* right . . .”).

²³⁷ See Choper, *supra* note 160 (manuscript at 24) (asserting that allowing a court to weigh public acceptability would “conflict[] with the politically neutral and principled role supporting its antimajoritarian existence in a democratic government”).

²³⁸ See Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 20 J.L. & POL. 373, 460 (2004) (“[W]e lawyers both cannot deny and cannot accept that law is essentially political.”).

²³⁹ Cf. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 179, at 83 (characterizing a case as “hard . . . when no settled rule dictates a decision either way”).

in thinking about the role of the courts and the nature of constitutional rights.

D. An Agenda

Once it is acknowledged that there can be permissible disparities between constitutional norms and implementing doctrines — as reflection on the role played by the demand for judicially manageable standards establishes — the question of how to define the grounds and limits of permissible disparity grows urgent. Even if the permissible disparity thesis does not yield sharp conclusions, it thus furnishes an agenda. We need overall theories of how courts should decide constitutional cases, not just theories of constitutional meaning. And to construct such theories, we need enriched accounts of the nature of constitutional rights, such that they can tolerate limits on judicial enforcement without altogether forfeiting their status as rights.

V. CONCLUSION

The idea of judicially manageable standards opens a window onto the judicial role in crafting doctrinal tests to implement the Constitution. When we peer through that window, a number of conclusions emerge, including these:

* Not every constitutional provision or norm is itself a judicially manageable standard.

* When a constitutional norm is not a judicially manageable standard, it becomes the function of courts to attempt to devise or select one.

* If a judicially manageable standard cannot be devised, the political question doctrine applies, and cases must be dismissed as nonjusticiable.

* In devising tests, courts are of course concerned with constitutional meaning, but judicial manageability is a distinct requirement of constitutional adjudication. A vague standard might capture the semantic meaning of a vague constitutional norm with nearly perfect precision, yet fail the requirement of judicial manageability.

* In assessing judicial manageability, courts are largely concerned with whether future courts would be able to apply a standard consistently and predictably. When the question is put this way, however, the further question arises: how much consistency and predictability is enough? For better or for worse, the answer frequently turns on a relatively open-ended, all-things-considered assessment of whether the costs of allowing litigation to proceed under a particular standard would exceed the benefits.

* Although the concept of judicially manageable standards features most prominently in the political question doctrine, similar concerns pervasively influence the design of the doctrinal tests that courts rou-

tinely apply. In essence, these doctrinal tests are judicially manageable standards, crafted to guide the application of constitutional language that would otherwise be too vague.

* Largely but not exclusively in order to achieve judicial manageability, some of the doctrinal tests crafted by courts underenforce, and some overenforce, the constitutional norms they are designed to implement. The political question doctrine, which calls for total nonenforcement, is only the most extreme case of constitutional underenforcement.

* Cases of over- and underenforcement resulting from the need for judicially manageable standards demonstrate that there can be permissible disparities between constitutional meaning, on the one hand, and constitutional doctrine, on the other.

* Recognizing that there can be permissible disparities between constitutional meaning and constitutional doctrine should cause us to think about constitutional theories in a new light. Many prominent theories, such as originalism, are theories of constitutional meaning, not complete theories of constitutional adjudication. A complete theory would deal expressly with questions involving when, why, and to what extent divergences between constitutional meaning and constitutional doctrine should be allowed.

* If there can be permissible disparities between constitutional meaning and constitutional doctrine, it may be because constitutional norms can be partly aspirational, not always requiring immediate enforcement. This thought is unfamiliar, but not without allure. The Constitution may deserve allegiance as much because of the ideals that it embodies as because of the regime of judicially enforceable law that it presently supports.

By signaling the existence of a permissible disparity between constitutional ideals and implementing doctrine, the notion of judicially manageable standards invites questions that have too often escaped notice. On what grounds should a gap between meaning and doctrine be allowed to open? Which compromises are permissible and which not? To date, the notion of judicially manageable standards has functioned mostly as a tool of judicial analysis, especially to guide Supreme Court Justices in considering what roles they and other judges can sensibly perform. But the underlying questions are not for judges alone. Reflection on the demand for judicially manageable standards should inspire both scholars and citizens to think more deeply about what courts actually do in constitutional cases and about the kinds of judgments that we the people should want courts to make on our behalf.