

A MANAGEABLE CONSTITUTION

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Abstract: Federal judges frequently avoid constitutional cases that raise difficult issues of public policy, using doctrines like standing and political questions as shields against judicial overreach. But a new and dangerous sword that allows judges to declare constitutional cases nonjusticiable is emerging in federal courts: a manageability prerequisite. The manageability prerequisite that emerged first in the Supreme Court's gerrymandering jurisprudence and has since spread virulently throughout the circuit and district courts threatens to close the courthouse doors to a wide swath of litigants. Left unchecked, manageability could both significantly weaken the weakest branch and provide judges unbounded discretion to preserve any status quo that aligns with their policy preferences.

This Article is the first to identify the manageability prerequisite that looms over federal courts. It describes and catalogues manageability's expansion, detailing both its breadth and its amorphous contours. That empirical analysis reveals the threat manageability poses to judicial resolution of issues like voting rights, environmental law, criminal justice reform, women's health, and many others.

That threat need not be realized. As this Article's normative analysis demonstrates, manageability is largely duplicative of existing workability review under *stare decisis* doctrine. Furthermore, courts are certain to apply manageability inconsistently because they lack information on the effectiveness of a legal test when making an *ex ante* determination of its viability. Federal courts should not adopt manageability, even if in exchange they must permit more frequent *ex post* reversals after workability review. Such a grand bargain will allow courts to capitalize on the utility of the occasional unmanageable legal test, especially in cases involving novel issues of pressing importance to the nation.

INTRODUCTION

Constitutional litigation in federal courts is both inherently complex and vitally important. The issues are often critical to our nation's future, yet judges facing these challenging cases may prefer to avoid them altogether—either out

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of a genuine desire to minimize the role of the judiciary, or, perhaps more likely, because the judge harbors a policy preference for the status quo. As many commentators have noted, judges have repeatedly stiffened standing requirements¹ and broadened the political question doctrine,² creating dubious doctrinal cover to claim that courts simply cannot adjudicate a growing number of cases. This Article is the first to describe, catalogue, and examine a new “sidestepping doctrine”³ that has arisen in federal courts: a manageability prerequisite to constitutional litigation.

Manageability has origins in the Supreme Court’s political question doctrine and similarities to the redressability prong of standing analysis.⁴ But manageability has become a novel, distinct prerequisite for nearly any constitutional claim in federal courts.⁵ Manageability’s growth comes with great potential costs. It precludes the judiciary from playing any role in resolving critical systemic issues facing our government, which might include voting rights, environmental law, criminal justice reform, or women’s health, to name just a few. And such judicial “minimalism” may not be politically neutral; it often maintains a conservative status quo that aligns with the judges’ policy preferences.⁶

This Article begins with an empirical study of manageability’s growth from a minor branch of the political question doctrine into a substantial prerequisite for all constitutional litigants.⁷ In addition to the Supreme Court’s

¹ See, e.g., Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195 n.20 (2014) (collecting sources); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 324–30 (2002); Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 7 (2016) (discussing standing requirements); Richard L. Heppner, Jr., *Statutory Damages and Standing After Spokeo v. Robins*, 9 CONLAWNOW 125, 125 (2018).

² See, e.g., Michael Gentithes, *Gobbledygook: Political Questions, Manageability, & Partisan Gerrymandering*, 105 IOWA L. REV. 1081, 1084 nn.11–12 (2020) (collecting sources); 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, 265 (2002) (describing the political question doctrine); McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court’s Conflict with Itself*, 69 HASTINGS L.J. 1509, 1526 (2018).

³ Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 754 (2019); see also Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Rein-vigorating Judicial Restraint Doctrines*, 62 S. CAL. L. REV. 201, 232 (2010) (describing “[d]octrinal [e]xit [r]amps” judges can use to avoid adjudication).

⁴ See *infra* notes 63–78 and accompanying text.

⁵ See *infra* notes 195–232 and accompanying text.

⁶ This may reflect the tightening of standing requirements in recent years that others have argued preserves existing power dynamics in American politics. See Nichol, *supra* note 1, at 324–30.

⁷ See *infra* notes 26–78 and accompanying text. In its classical form, the political question doctrine simply recognizes that a small swath of controversies is outside the judiciary’s ambit; either the Constitution’s text or its structure commits those issues to the political branches, where policy debates, rather than reasoned legal analysis, must resolve them. See Barkow, *supra* note 2, at 246–56; Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L.

holding that extreme partisan gerrymandering presents an unmanageable political question,⁸ an amoeba-like manageability requirement has emerged in federal cases involving abortion rights,⁹ cruel and unusual punishment,¹⁰ environmental law,¹¹ and even census-taking.¹² A growing number of federal judges have taken the Supreme Court's cue and applied a manageability prerequisite seemingly across the board.¹³

After describing and cataloguing the manageability prerequisite, this Article offers the first normative response to the phenomenon. That response proceeds in four parts. First, this Article explains that manageability is largely unnecessary, given its similarity to the workability doctrine within the strong stare decisis tradition.¹⁴ Manageability forces parties to provide workable legal tests *ex ante*, rather than allow lower courts to experiment, then decide *ex post*

REV. 40, 78–79 (1961); Cunningham, *supra* note 2, at 1523–25 (collecting authorities); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1211–13 (2006); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959). Prudential concerns were long considered secondary to the classical version of the political question doctrine until the Supreme Court recently elevated manageability to a primary consideration in extreme partisan gerrymandering cases. See Gentithes, *supra* note 2, at 1090–91. That prudential strand suggests that courts should also steer clear of issues that are so complex or nuanced that judges have little hope of crafting a manageable test to resolve them. Cunningham, *supra* note 2, at 1526 (“The requirement of a judicially manageable standard is a prudential one.”).

⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

⁹ *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2179–80 (2020) (Gorsuch, J., dissenting), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *see also infra* notes 187–194 and accompanying text.

¹⁰ *Jones v. Mississippi*, 141 S. Ct. 1307, 1326 (2021) (Thomas, J., concurring) (“[T]he ‘line’ *Milner* ostensibly ‘drew . . . between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption’ is more fanciful than real.” (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016))); *see also id.* at 1315 (majority opinion) (“[T]he Court has recognized that it ‘is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005))). In *Jones v. Mississippi*, the majority held that courts do not need to make a finding of permanent incorrigibility on the record to sentence a juvenile to life without parole. *Id.* at 1311. In part, the difficulty of reaching such a finding may have motivated both Justice Kavanaugh’s majority and Justice Thomas’s concurrence to essentially remove this requirement. *Id.* at 1315, 1326 (Thomas, J., concurring).

¹¹ *See infra* notes 118–143 and accompanying text.

¹² *See infra* notes 172–181 and accompanying text.

¹³ *See infra* notes 111–186 and accompanying text.

¹⁴ *See infra* notes 199–214 and accompanying text; Colin Starger, *The Dialectic of Stare Decisis Doctrine*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 19, 29 (Christopher J. Peters ed., 2013) (describing the “strong conception[] of stare decisis” as that which “requires a ‘special justification’ for overruling beyond mere belief that the challenged precedent was ‘wrongly decided’” (citations omitted)). An emerging, “weaker” conception of stare decisis alternatively posits that poor reasoning in a prior decision may, without more, justify overruling precedent. Starger, *supra*, at 29; *see also* Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 87–88 (2020).

whether those experiments have proven unworkable and must be reversed. Ex ante manageability decisions preclude judicial innovation, often preserving a relatively conservative status quo.¹⁵ Instead, judges should adopt a bargain that accepts robust workability review while averting manageability as a prerequisite.

Second, although manageability's supporters claim fealty to judicial minimalism, in fact manageability expands judicial discretion.¹⁶ Manageability is so poorly defined that judges who deploy it will be forced to make highly discretionary and likely inconsistent decisions about when the prerequisite has been met.¹⁷ Far from cabining judicial policy preferences, manageability creates a broad new avenue to support them.

Third, this Article suggests that some unmanageable legal tests are a feature of the legal system, not a bug.¹⁸ Especially where pressing constitutional controversies have lingered without political resolution, a flexible legal standard that some might consider unmanageable may be more useful than a rigid legal rule. Workability review can operate as a thermostat for flexibility in legal tests, adjusting between malleable standards and stricter rules after collecting data about the effectiveness of a proposed legal test.

Lastly, this Article offers recommendations should a manageability prerequisite continue to grow in federal courts despite the critiques listed above.¹⁹ That prerequisite should not be overly exacting, first finding plausible tests too imprecise and later finding them too inflexible.²⁰ And that manageability prerequisite must not rely upon any single interpretive method; it should garner support from all judges without devolving into a debate about just how "wrong" an existing legal test is.²¹

Part I of this Article briefly reviews the history of sidestepping doctrines judges have used to avert many constitutional cases, including the political question doctrine and standing analysis.²² It positions the novel manageability

¹⁵ See *infra* notes 195–231 and accompanying text.

¹⁶ See *infra* notes 215–221 and accompanying text.

¹⁷ See *infra* notes 215–221 and accompanying text.

¹⁸ See *infra* notes 226–263 and accompanying text.

¹⁹ See *infra* notes 264–266 and accompanying text.

²⁰ That alternation was a disastrous trend in extreme partisan gerrymandering cases, where the Court complained that plausible tests of the extremity of gerrymandering were too imprecise or, alternatively, too inflexible. Gentithes, *supra* note 2, at 1098–103.

²¹ See RANDY KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 63 (2017).

This suggestion is similar to the standard that Randy Kozel has advocated regarding the Court's stare decisis doctrine, arguing that the standard will be effective only if Justices across the spectrum of interpretive methods can agree upon its content. See *id.* at 61. Interestingly, the litigants in *Dobbs v. Jackson Women's Health Organization* suggested that the legal test in *Roe v. Wade* was unworkable under stare decisis principles because it frustrated states that wished to regulate abortion more heavily. Brief for Petitioners at 20–21, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392).

²² See *infra* notes 26–78 and accompanying text.

prerequisite within that tradition, noting that manageability is both related to and analytically distinct from those doctrines. Part II catalogues manageability's emergence in federal courts, offering the first empirical description of this important doctrinal phenomenon.²³ Part III outlines the normative case against a manageability prerequisite, explaining that manageability is a needless *ex ante* duplication of workability review, broadens judicial discretion, and may even be undesirable in some cases.²⁴ Finally, Part IV offers normative recommendations if the manageability prerequisite persists, arguing for consistency across interpretive methodologies in defining a constitutional "standard for standards."²⁵

I. THE SIDESTEPPING DOCTRINES: POLITICAL QUESTIONS, STANDING, AND (NOW) MANAGEABILITY

Manageability is a new, emerging prerequisite to adjudication in constitutional cases.²⁶ But it is a descendant of more traditional avenues to preclude litigation.²⁷ Federal judges have long used several methods, such as the political question doctrine and Article III standing analysis, to refuse to adjudicate some constitutional claims.²⁸ Taken together, such "sidestepping doctrines"²⁹ or "[d]octrinal [e]xit [r]amps"³⁰ allow courts to argue that they are compelled to dismiss certain cases.³¹

As this Part explains, the manageability prerequisite has similarities to both political question jurisprudence and standing doctrine. Nonetheless, manageability is an analytically distinct form of sidestepping doctrine. Standing addresses the power of Article III courts and the limits the United States Constitution itself created via its text and structure.³² The political question doctrine is similar, at least in its classical form; it explains that the Constitution has assigned some questions to the political branches, either through express text or through the very structure of government that the text establishes.³³ But a manageability prerequisite to adjudication is different. As the discussion be-

²³ See *infra* notes 79–194 and accompanying text.

²⁴ See *infra* notes 195–232 and accompanying text.

²⁵ See *infra* notes 233–266 and accompanying text.

²⁶ See *infra* notes 38–78 and accompanying text.

²⁷ See *infra* notes 38–78 and accompanying text.

²⁸ See *infra* notes 38–78 and accompanying text.

²⁹ Kuh, *supra* note 3, at 754.

³⁰ Gifford, *supra* note 3, at 232.

³¹ This is so even if "the doctrines are largely prudential, or at least the standards for their application are sufficiently flexible that outcomes can be understood to largely reflect a normative assessment of the 'proper' role for courts." Kuh, *supra* note 3, at 754 (footnote omitted).

³² See Hall, *supra* note 1, at 7.

³³ Barkow, *supra* note 2, at 265.

low reveals, manageability is not tethered to a constitutional requirement at all; it is a judicial creation that limits the cases the judiciary can decide.³⁴

Section A of this Part provides a history and overview of the political question doctrine,³⁵ and Section B discusses standing.³⁶ Section B then compares aspects of standing and the political question doctrine to manageability.³⁷

A. The History of the Political Question Doctrine

Under the political question doctrine, courts have long recognized that the Constitution's text or structure requires branches of the government other than the judiciary to resolve some disputes.³⁸ As early as *Marbury v. Madison*, the United States Supreme Court recognized "that where there is a legal right, there is also a legal remedy," yet noted that some actions of the executive branch are constitutionally "submitted to the executive" and therefore "only politically examinable."³⁹ The Court in *Marbury* further noted that the Constitution's text, structure, or historical practice placed power within the government's political branches, not the Court, to review certain executive branch actions.⁴⁰ The key feature, then, of political questions was that they concerned structural issues about which branch of the government had the constitutional authority to address certain kinds of issues.

Manageability itself was not a requirement within the political question doctrine until the twentieth century.⁴¹ Early political question doctrine rested largely on the fact that a particular issue was committed to congressional discretion, remaining focused on structural commitments to coordinate branches as the primary feature of political questions.⁴² The Court made its fullest statement regarding the modern political question doctrine in *Baker v. Carr*, a 1962 challenge to Tennessee's malapportioned election districts.⁴³ In *Baker*,

³⁴ Following this Part's discussion of the relationship among manageability, political questions, and standing doctrine, Part II catalogues manageability's emergence in federal courts hearing constitutional cases. See *infra* notes 79–194 and accompanying text.

³⁵ See *infra* notes 38–59 and accompanying text.

³⁶ See *infra* notes 60–62 and accompanying text.

³⁷ See *infra* notes 63–78 and accompanying text.

³⁸ See Brief for Constitutional Law Professors as *Amici Curiae* in Support of Appellees at 5–6, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

³⁹ 5 U.S. 137, 163, 166, 170 (1803).

⁴⁰ Brief for Constitutional Law Professors as *Amici Curiae* in Support of Appellees, *supra* note 38, at 6 ("Subsequent cases held that certain questions were nonjusticiable political questions because they were committed unreviewably to the discretion of the political branches by the text of the Constitution, its structure, or historical practice.").

⁴¹ Gentithes, *supra* note 2, at 1090.

⁴² Coleman v. Miller, 307 U.S. 433, 450, 454–56 (1939); Brief for Constitutional Law Professors as *Amici Curiae* in Support of Appellees, *supra* note 38, at 8.

⁴³ 369 U.S. 186, 192, 217 (1962).

the Court again summarized the features of the political question doctrine with an emphasis, first, on the Constitution's textual commitment of the issue in question to a coordinate branch.⁴⁴ The Court later described six features of a political question:

[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.⁴⁵

The *Baker* Court's description emphasized that the manageability feature of political questions is of somewhat less importance; more critical is whether the Constitution has assigned an issue to a coordinate branch. Manageability is neither a necessary nor sufficient condition for application of the political question doctrine under *Baker*.⁴⁶

Many scholars have suggested that the strands of the political question doctrine are either classical or prudential,⁴⁷ with manageability falling into the latter category, and clear textual commitment to another branch falling into the former.⁴⁸ Most of the Court's applications of the political question doctrine reflect the emphasis on classical strands of the doctrine over prudential ones. Thus, where the Court has ruled an issue a nonjusticiable political question post-*Baker*, it has consistently determined whether the issue is textually committed to another branch before considering manageability.⁴⁹

For instance, in holding that the way in which Ohio trained its National Guard members was a nonjusticiable political question, in *Gilligan v. Morgan*,

⁴⁴ See *Davis v. Bandemer*, 478 U.S. 109, 121 (1986) (discussing *Baker*, 369 U.S. at 217), *abrogated by* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

⁴⁵ *Baker*, 369 U.S. at 217.

⁴⁶ *Id.*

⁴⁷ See, e.g., Barkow, *supra* note 2, at 246, 256–57; Bickel, *supra* note 7, at 79; Cunningham, *supra* note 2, at 1525–26; Gerhardt, *supra* note 7, at 1211–12; Wechsler, *supra* note 7, at 7–9.

⁴⁸ Cunningham, *supra* note 2, at 1526 (“The requirement of a judicially manageable standard is a prudential one.”).

⁴⁹ Brief for Constitutional Law Professors as *Amici Curiae* in Support of Appellees, *supra* note 38, at 9 (“[E]ven where the Court has held an issue nonjusticiable as a political question, the Court has relied primarily upon commitment of that issue to the political branches.” (first citing *Nixon v. United States*, 506 U.S. 224, 229–36 (1993); and then citing *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) (summarizing the emergence of the political question doctrine))).

the Court emphasized that Article I, Section 8 of the Constitution textually committed the issue to the political branches.⁵⁰ The Court likewise held that an issue was a nonjusticiable political question based upon a textual commitment to a coordinate branch in *Nixon v. United States*.⁵¹ There, Chief Justice Rehnquist acknowledged that the Constitution's textual commitment was of primary importance, though practical manageability considerations might also be informative.⁵² The Court again suggested that manageability was a lesser concern in *Zivotofsky ex rel. Zivotofsky v. Clinton*, where it began its analysis by highlighting that political question jurisprudence has distilled the doctrine to just the first two criteria listed in *Baker*, eschewing the remaining four.⁵³

Despite the traditional emphasis on textual or structural commitment to other branches, the Supreme Court has subtly shifted its political question doctrine jurisprudence to accentuate manageability. In 2019, in *Rucho v. Common*

⁵⁰ 413 U.S. at 6–11 (discussing U.S. CONST. art. I, § 8).

⁵¹ 506 U.S. at 229–36. The Court ruled that the procedure by which the Senate conducted impeachment trials was a political question primarily because under Article I, Section 3 of the Constitution, “[t]he Senate shall have the sole Power to try all Impeachments.” *Id.* at 229 (quoting U.S. CONST. art. I, § 3, cl. 6).

⁵² *Id.* at 228–29. The Court explained that:

[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

Id.

⁵³ 566 U.S. 189, 195 (2012). Commentators have also noted an evolution in the political question doctrine towards an emphasis on only the first two common characteristics of political questions. *E.g.*, Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1213 (2002). As Mark Tushnet has observed,

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

Id.; see also Brief for Constitutional Law Professors as *Amici Curiae* in Support of Appellees, *supra* note 38, at 8 (“Some decisions mentioning judicial manageability, for example, treat it as the only factor to be considered in political question analysis in addition to commitment to the political branches.” (citing *Zivotofsky*, 566 U.S. at 195)). Jesse Choper has suggested a set of four criteria to determine the existence of a political question, including whether “there is a textual commitment to a coordinate political department,” whether “judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme,” whether “the Court . . . cannot formulate principled, coherent tests as a result of ‘a lack of judicially discoverable and manageable standards,’” and whether the plaintiffs complain of “constitutional injuries that are general and widely shared[.]” Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1462–63 (2005) (footnotes omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Cause, the Justices fixated upon the manageability of standards when determining whether extreme partisan gerrymandering is a political question.⁵⁴ The Court claimed that cases “that lack ‘judicially discoverable and manageable standards for resolving [them]’” are a discrete category of political question cases.⁵⁵ The Court’s analysis of justiciability in *Rucho* then centered upon the need for manageable standards, and the Court proceeded to reject every standard that the plaintiffs, dissent, and lower court had proposed.⁵⁶

The *Rucho* Court’s justiciability analysis failed to note the order in which the *Baker* Court presented the “features” of the political question doctrine.⁵⁷ Ultimately, because of “the absence of a constitutional directive or legal standard[] to guide [the Court] in” resolving such cases, the Court held that extreme partisan gerrymandering claims are nonjusticiable political questions.⁵⁸ As Part II discusses, that decision opened the door for federal courts to use manageability as a prerequisite to hearing a wide variety of cases not traditionally considered political questions.⁵⁹

B. Standing Doctrine

Article III standing doctrine limits the types of grievances people can use the courtroom to resolve. In its traditional form, standing doctrine achieves this by requiring a plaintiff to show that: (1) they have suffered a concrete and particularized injury in fact (concreteness requirement); (2) the challenged conduct caused the injury (causation requirement); and (3) the court can redress the injury (redressability requirement).⁶⁰ Standing thus requires more, for ex-

⁵⁴ See 139 S. Ct. 2484, 2500–02 (2019).

⁵⁵ *Id.* at 2494 (quoting *Baker*, 369 U.S. at 217). The Court’s prior descriptions of the political question doctrine, however, have not suggested that a case is nonjusticiable *solely* because there are no manageable standards to resolve it. See Brief for Constitutional Law Professors as *Amici Curiae* in Support of Appellees, *supra* note 38, at 9 (“[E]ven where the Court has held an issue nonjusticiable as a political question, the Court has relied primarily upon commitment of that issue to the political branches.” (first citing *Nixon*, 506 U.S. at 229–36; and then citing *Gilligan*, 413 U.S. at 11)).

⁵⁶ See 139 S. Ct. at 2491, 2501–07.

⁵⁷ *Id.* at 2496–98.

⁵⁸ *Id.* at 2508.

⁵⁹ See *infra* notes 79–194 and accompanying text.

⁶⁰ See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (holding that a plaintiff must show that they “personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision” (internal quotations and citations omitted)); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In *Lujan*, the Court explained:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the chal-

ample, than just a general grievance about the government's operation shared by all citizens that they should resolve through the political process, not the judicial process.⁶¹ Instead, standing ensures that only litigants who will personally be affected by the challenged conduct can access the courthouse.⁶²

1. Concreteness, Political Questions, and Manageability

In its traditional form, standing doctrine implicitly assumes that there may be some injuries spread so broadly among citizens that it is difficult, if not impossible, to define them in concrete terms. Without such concretely defined injuries, courts cannot provide relief because they cannot connect the challenged conduct to any harm an individual litigant has suffered. Standing doctrine implies that courts cannot redress such inchoate injuries.

Recent Supreme Court analyses emphasize the Court's commitment to rejecting litigants with insufficiently concrete injuries, precluding a growing number of litigants from the courthouse. In its 2016 decision in *Spokeo, Inc. v. Robins*, the Court reiterated that constitutional standing is present only if the plaintiff suffered a concrete injury in fact, then suggested that Congress cannot create such injuries by fiat simply by including a statutory damages remedy in legislation.⁶³ This decision shifted the focus of standing jurisprudence from the connection between challenged conduct and an individual plaintiff to the nature of the injury itself.⁶⁴ *Spokeo* suggested that even if an injury is sufficiently particularized (in that it can be causally related to a specific plaintiff), it may not be sufficiently concrete (in that it has enough demonstrable consequences in the real world to support a lawsuit).⁶⁵

Five years later, in *TransUnion v. Ramirez*, the Court again noted that an injury does not become concrete simply because Congress created a statutory

lenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560–61 (internal alterations, citations, and quotations omitted). The redressability requirement itself has two requirements: (1) that the relief sought be substantially likely to provide redress to the plaintiff; and (2) that the district court have the power to award the relief the plaintiff is seeking. *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)).

⁶¹ Hall, *supra* note 1, at 7.

⁶² As Justice Scalia famously put it, the question the standing doctrine asks is: “What’s it to you?” Heppner, *supra* note 1, at 128 (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983)).

⁶³ 578 U.S. 330, 339–41 (2016); Heppner, *supra* note 1, at 125.

⁶⁴ Heppner, *supra* note 1, at 128 (“With *Spokeo*, . . . the focus shifted to . . . [deciding] [w]hen is an injury real and personal—not abstract or attenuated—enough to grant standing?”).

⁶⁵ 578 U.S. at 339–41.

cause of action to redress it—although such congressional action might be instructive to standing analysis.⁶⁶ In a holding likely to reduce the federal judiciary's role in class action lawsuits based upon private rights of action that are statutorily created,⁶⁷ the Court emphasized that it would “resolve only ‘a real controversy with real impact on real persons.’”⁶⁸

There are many parallels between the Court's recent expansion of the concreteness requirement within standing doctrine and a broad manageability prerequisite to federal litigation. For example, both requirements seek to limit judicial discretion to enter major policy debates, hoping to ensure that the judiciary intervenes only when there is a clear injury with a straightforward judicial solution. Standing and manageability, then, are both means of limiting courts' dockets to certain core functions, leaving coordinate branches to do the heavy lifting on matters of policy.

Nonetheless, the concreteness prong of standing doctrine is distinct from a manageability prerequisite because of its focus on litigants rather than judges.⁶⁹ Concreteness, in both its limited traditional form and more recent expansive interpretation, focuses on the effect of litigation on real-world litigants. The tether between those litigants and the alleged harm must be narrow, clear, and “real” enough to justify judicial intervention. Manageability, on the other hand, suggests that some legal tests cannot be defined in terms that are simple enough for judges to implement. Manageability's focus is on the difficulty judges face in resolving a controversy, not the relationship between that controversy and individual litigants. It is thus possible that a litigant can present a concrete injury, yet judges may not be able to adjudicate the controversy because the legal norms needed to do so are too difficult for judges to deploy and for the public to understand. Manageability thus suggests that judges are not able to address certain kinds of harms, even if the harm is clear and its connection to the defendant is beyond doubt.

Manageability's focus on the challenges judges face also distinguishes it from the traditional political question doctrine. The two appear similar on the surface because they both suggest that there are some controversies that are not appropriate for the judicial branch to resolve. But whereas the political question doctrine considers constitutional structure and the purview of coordinate branches under our foundational legal norms, manageability considers judges' capabilities and the challenges they will face when resolving new conflicts.

⁶⁶ 141 S. Ct. 2190, 2204–05 (2021).

⁶⁷ *Article III Standing—Separation of Powers—Class Actions—TransUnion v. Ramirez*, 135 HARV. L. REV. 333, 340 (2021).

⁶⁸ *TransUnion*, 141 S. Ct. at 2203 (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring)).

⁶⁹ See *infra* notes 79–194 and accompanying text.

Manageability does suggest that it is inappropriate for judges to deploy some legal tests that evaluate broader policy objectives. But it is not simply the political aspects of those tests, or the issues the tests address, that preclude adjudication. Instead, it is the very challenge judges would face in trying to resolve policy disputes with indeterminate tests that provide little firm, rule-like guidance that makes a case too unmanageable to resolve. A case's manageability does not turn upon whether the Constitution's language or structure assigns the controversy to political resolution by coordinate branches; instead, manageability depends upon whether the actors within the judicial branch are given too much discretion and too little guidance to resolve the controversy in a consistent and explainable way.

2. Redressability, Political Questions, and Manageability

Standing jurisprudence comes closest to expressing the same concerns as the manageability prerequisite (as well as the political question doctrine) in its third requirement: that the plaintiff must show that an Article III court can redress the injury. That analysis in turn requires a court to ask whether: (1) the relief sought is substantially likely to redress the plaintiff's injuries; and (2) the court has the power to award that relief.⁷⁰ The first prong "examines the causal connection between the alleged injury and the judicial relief requested[.]"⁷¹ and is often a clear corollary to the separate causation prong of standing doctrine.⁷² The second prong, though, "blurs into other nonjusticiability doctrines, such as the political question doctrine."⁷³ Redressability's second prong emphasizes that judicial decision-makers cannot enforce "sweeping remed[ies] [that] would require federal courts to . . . override the constitutional authority

⁷⁰ *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)).

⁷¹ Vivienne Pismarov, *Why Conservatives Should Challenge the Redressability Decision in Juliana*, AM. BAR ASS'N (May 27, 2021) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)), https://www.americanbar.org/groups/environment_energy_resources/publications/ccsde/20210527-why-conservatives-should-challenge/ [<https://perma.cc/KKY5-SUKP>]. "[W]hile redressability must not be speculative, it need only be 'likely,' not certain." *Ala.-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1256 (11th Cir. 2003) (quoting *Tenn. Valley Auth. v. U.S. EPA*, 278 F.3d 1184, 1207 (11th Cir. 2002), *withdrawn in part by* *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003)).

⁷² *See Re, supra* note 1, at 1217 ("Most cases view redressability as an essentially automatic corollary of causation: if the asserted violation causes injury, then a court can provide relief, either by terminating the violation or compensating for it.").

⁷³ *Id.*

of the political branches.”⁷⁴ Thus, the second prong is concerned with the power of Article III courts to offer remedies to certain kinds of injuries.⁷⁵

Generally, conservative jurists who seek a smaller judicial footprint in American democracy favor expanding the second prong.⁷⁶ They argue that although courts might be able to offer limited directives to legislators to address a specific issue, they lack the power to specify exactly which steps legislators should take to resolve problems or to manage the outcomes of the political process that lead to a chosen resolution.⁷⁷ Thus, much like the political question doctrine, the redressability prong of standing analysis worries that judges will improperly resolve policy matters that are best left to elected representatives.⁷⁸

Though the two are related, redressability analysis does not focus on the capacity of individual judges to resolve policy disputes in the way that the manageability prerequisite does. When courts refuse to adjudicate a dispute due to a lack of manageable standards, they posit that the matter is simply too complex and multifarious for a single judge to resolve on their own. On the other hand, the redressability prong of standing analysis focuses on the difficulty of enforcing the judge’s decision, given the limited powers of Article III courts. When courts refuse to adjudicate a dispute on redressability grounds, they suggest that the issue is beyond the reach of judicial resolution as a matter of practical administration, largely because the least dangerous branch lacks the political capital to reject the policy preferences of coordinate branches and replace them with their own.

⁷⁴ Bradford C. Mank, *Can Judges Use Due Process Concepts in Obergefell to Impose Judicial Regulation of Greenhouse Gases and Climate Change? The Crucial Case of Juliana v. United States*, 7 BELMONT L. REV. 277, 300 (2020) (discussing *Juliana*, 947 F.3d at 1164–65).

⁷⁵ See Re, *supra* note 1, at 1217 (“[T]he redressability requirement is sometimes thought to ask whether courts are capable of halting or curing the alleged violation of law.”).

⁷⁶ See Pismarov, *supra* note 71; Nichol, *supra* note 1, at 324–30. Nichol has argued that standing doctrine also systematically favors those who already maintain political power, as Justices intuitively grant standing in cases involving claims they might raise themselves. Nichol, *supra* note 1, at 305, 326; see also Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1050 (2009) (“The more restrictive aspects of current doctrine have also been defended by conservative scholars.”).

⁷⁷ See Robert Kemper, *Recognizing a Fundamental Right to a Clean Environment: Why the Juliana Court Got It Wrong and How to Address the Issue Moving Forward*, 16 FIU L. REV. 457, 474–75 (2022) (arguing that U.S. courts could redress climate change by recognizing a right to a clean environment while leaving discretion to policymakers as to how to respond to the issue).

⁷⁸ *Id.* at 470 (first quoting *Juliana*, 947 F.3d at 1173; and then quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2058 (2019)). “Democratic values particularly counsel judicial restraint in light of the federal courts’ well-recognized lack of policy expertise and dependence on adjudicatory information gathering.” Re, *supra* note 1, at 1206.

II. THE EMERGENCE OF A MANAGEABILITY PREREQUISITE

In recent years, a manageability prerequisite has emerged as a new entrant in the canon of sidestepping doctrines. This Part documents how federal courts have begun requiring litigants to provide a manageable legal test as a prerequisite for raising constitutional claims.⁷⁹ Section A shows how recent Supreme Court jurisprudence has featured manageability, both in *Rucho v. Common Cause*'s and *Gill v. Whitford*'s discussions of partisan gerrymandering and in other areas of constitutional law, including individual rights and criminal procedure.⁸⁰ Section B then examines how numerous federal courts, including four circuit courts of appeal⁸¹ and five district courts,⁸² have relied on the Supreme Court's language in *Rucho* and other cases to apply a broad manageability prerequisite.⁸³ Section C analyzes how federal courts may apply the manageability concerns the Court expressed in 2020 in *June Medical Services v. Russo* outside the abortion context.⁸⁴

A. Manageability in Supreme Court Jurisprudence

As noted above, the Court's political question jurisprudence has long considered manageability a matter of secondary importance behind any express commitment of the issue to a coordinate branch.⁸⁵ In contrast, recent partisan

⁷⁹ See *infra* notes 85–194 and accompanying text.

⁸⁰ *Rucho*, 139 S. Ct. at 2500; *Gill v. Whitford*, 138 S. Ct. 1916, 1923–24 (2018); see *infra* notes 85–110 and accompanying text.

⁸¹ *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 438–39 (6th Cir.) (Thapar, J., concurring in part and dissenting in part), *reh'g en banc granted and opinion vacated*, 18 F.4th 550 (6th Cir. 2021) (mem.); *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Bennett v. Metro. Gov't Nashville & Davidson Cnty.*, 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, J., concurring); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020); *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *Juliana*, 947 F.3d at 1159; see also *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347, 385 (5th Cir. 2020) (Ho, J., concurring) (citing Justice Gorsuch's dissent in *June Medical Services v. Russo* to critique the elevation of abortion rights over other healthcare matters).

⁸² *Banerian v. Benson*, 589 F. Supp. 3d 735 (W.D. Mich. 2022); *Mecinas v. Hobbs*, 468 F. Supp. 3d 1186 (D. Ariz. 2020), *rev'd*, 30 F.4th 890 (9th Cir. 2022); *Miller v. Hughs*, 471 F. Supp. 3d 768 (W.D. Tex. 2020); *Nelson v. Warner*, 472 F. Supp. 3d 297 (S.D.W. Va. 2020); *Coal. for Good Governance v. Raffensperger*, No. 1:20-CV-1677-TCB, 2020 WL 6106630 (N.D. Ga. May 26, 2020).

⁸³ See *infra* notes 111–186 and accompanying text.

⁸⁴ 140 S. Ct. 2103 (2020); see *infra* notes 187–194 and accompanying text.

⁸⁵ The Court's earlier gerrymandering jurisprudence did not emphasize manageability nearly as much. For instance, in 1986, in *Davis v. Bandemer*, the Court noted that “[t]he mere fact” that neither party presented “a likely arithmetic presumption” to readily resolve political gerrymandering cases “does not compel a conclusion that the claims presented here are nonjusticiable.” 478 U.S. 109, 123 (1986), *abrogated by* *Rucho*, 139 S. Ct. 2484. Instead, the Court could wait for such manageable standards to evolve in future cases. *Id.*

gerrymandering jurisprudence has focused almost entirely upon the practical manageability feature of the political question doctrine.⁸⁶ The Court's decisions in *Gill* and *Rucho* both reflected this shift. In those cases, the Court complained that advanced metrics to measure extreme partisan gerrymandering were unsatisfying descriptions of a complex phenomenon⁸⁷ and, at best, explained the effects on political parties, not individual citizens who were the parties to the suits.⁸⁸ The *Rucho* majority was deeply concerned by the difficulty judges would face when attempting to measure extreme partisan gerrymandering. The Court claimed that cases "that lack 'judicially discoverable and manageable standards'" for resolution fall into a discrete category of nonjusticiable cases.⁸⁹ The Court's analysis of justiciability in *Rucho* then centered upon the need for manageable standards, rejecting all of the litigants' proposals.⁹⁰ The Court ultimately deemed extreme partisan gerrymandering nonjusticiable because it found no "limited and precise standards that are clear, manageable, and politically neutral."⁹¹

The trend towards manageability as a primary consideration in the justiciability of any controversy before the Court found more support in recent abortion litigation. In his dissenting opinion in *June Medical Services v. Russo*, Justice Gorsuch critiqued the plurality's legal test that required states to show that their laws accrued some benefit to women's health, claiming that it was so malleable as to hardly be a legal test at all.⁹² Justice Gorsuch argued that any legal test created by the Court should at least be "replicable and predictable," making it easier for lower courts to follow the Court's jurisprudence.⁹³ Justice Gorsuch then noted that "an administrable legal test even lies at the heart of what makes a case justiciable."⁹⁴ The plurality's proposal was no such test, according to Justice Gorsuch, who equated its "all-things-considered balancing of benefits and burdens" to a "hunter's stew," whereby judges with wide discretion would combine any factual details that "look[] interesting" into a deci-

⁸⁶ See *Vieth v. Jubelirer*, 541 U.S. 267, 277–81 (2004); *League of United Lat. Am. Citizens v. Perry*, 548 U.S. 399, 414–23 (2006); see also Gentithes, *supra* note 2, at 1092–94 (summarizing this trend in partisan gerrymandering cases).

⁸⁷ *Gill v. Whitford*, 138 S. Ct. 1916, 1923–24 (2018).

⁸⁸ *Id.* at 1924, 1933.

⁸⁹ *Rucho*, 139 S. Ct. at 2494 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁹⁰ *Id.* at 2501–07.

⁹¹ *Id.* at 2500, 2508.

⁹² 140 S. Ct. 2103, 2179–80 (2020) (Gorsuch, J., dissenting), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). This critique came in addition to Justice Gorsuch's critique of the plurality's reliance upon an incomplete factual record, unlike the record in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), decided four years earlier. *Id.* at 2178.

⁹³ *Id.* at 2179.

⁹⁴ *Id.*

sion.⁹⁵ Driving home his point, Justice Gorsuch quoted *Rucho*'s finding that extreme partisan gerrymandering is a political question because there were no "judicially discoverable and manageable standards for resolving" the issue.⁹⁶ This once-secondary component of the political question doctrine, then, appeared central, even to constitutional questions concerning individual rights.

Abortion litigation also highlights the relationship between manageability as a prerequisite to litigation and "workability" as a ground to overrule prior decisions under stare decisis principles. In stare decisis jurisprudence, "workability" refers to whether the legal test in a precedent can be logically applied such that courts and litigants can "understand . . . [the] rule without undue difficulty."⁹⁷ In 2022, in *Dobbs v. Jackson Women's Health Organization*, the majority harped on the alleged unworkability of the undue burden standard established in 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, using unworkability as grounds to overrule that decision.⁹⁸ The majority suggested that courts considering whether to overrule precedent should examine whether that precedent's rule "can be understood and applied in a consistent and predictable manner,"⁹⁹ using language strikingly similar to Justice Gorsuch's call for a "replicable and predictable" test for justiciability in *June Medical Services*.¹⁰⁰ The undue burden test "assigned [judges] an unwieldy and inappropriate task" that "would undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.'"¹⁰¹ The majority in *Dobbs* even cited to Justice Gorsuch's *June Medical Services* dissent, further demonstrating the close relationship between manageability and workability.¹⁰²

Similar concerns over unmanageable legal tests that judges are unequipped to implement recently appeared in the Court's Cruel and Unusual Punishments Clause jurisprudence. In *Jones v. Mississippi*, the Court held that a

⁹⁵ *Id.* at 2179–80.

⁹⁶ *Id.* at 2179 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019)).

⁹⁷ KOZEL, *supra* note 21, at 110; see also Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1254–55 (2018) (defining and proposing a new framework for unworkability).

⁹⁸ 142 S. Ct. 2228, 2238 (2022).

⁹⁹ *Id.*

¹⁰⁰ *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2179 (2020) (Gorsuch, J., dissenting), *abrogated by Dobbs*, 142 S. Ct. 2228.

¹⁰¹ *Dobbs*, 142 S. Ct. at 2275 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

¹⁰² *Id.* at 2272 (citing *June Med. Servs.*, 140 S. Ct. at 2180). In his own dissent in *June Medical Services*, Justice Thomas argued that stare decisis did not apply to *Roe v. Wade* and its progeny, in part because "poorly reasoned precedents that have proved themselves to be unworkable" are ripe for overruling. *June Med. Servs.*, 140 S. Ct. at 2151–52 (Thomas, J., dissenting). Justice Thomas's workability language varies slightly from Justice Gorsuch's manageability requirement, but the sentiment is the same: The Court should not intervene in issues where the only legal tests available are too mal-leable for lower courts to implement in "replicable and predictable" decisions. *Id.* at 2179 (Gorsuch, J., dissenting).

sentencing judge need not make a separate factual finding that a juvenile is “permanently incorrigible” before imposing a discretionary life sentence in homicide cases.¹⁰³ In part, that holding was motivated by the difficulty of determining when a juvenile has become permanently incorrigible. Prior cases, such as *Miller v. Alabama* and *Montgomery v. Louisiana*, appeared to suggest that only such permanently incorrigible juveniles could be sentenced to life.¹⁰⁴ The *Jones* Court held, however, that permanent incorrigibility was not an “eligibility criterion” for a juvenile life sentence.¹⁰⁵ For the Court, such a criterion could not be implemented because it “is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”¹⁰⁶ Thus, if courts cannot evaluate permanent incorrigibility—or, put another way, if permanent incorrigibility is not a manageable legal test—then courts should not apply such a requirement at all. The question is simply outside the realm of justiciable legal controversies.

In his concurrence in *Jones*, Justice Thomas stressed the unmanageability of a permanent incorrigibility test even more.¹⁰⁷ For Justice Thomas, “the ‘line’ *Miller* ostensibly ‘drew . . . between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption’ is more fanciful than real.”¹⁰⁸ Thus, Justice Thomas suggested that if the Court in *Montgomery* held that sentencing judges had to find juvenile defendants permanently incorrigible before sentencing them to life in prison, such a holding “had no basis in law or the Constitution.”¹⁰⁹ The very lack of clear tests to

¹⁰³ 141 S. Ct. 1307, 1311 (2021). For more background and extension of the Supreme Court’s Cruel and Unusual Punishments Clause jurisprudence, see Cameron Casey, Note, *Cruel and Unusual: Why the Eighth Amendment Bans Charging Juveniles with Felony Murder*, 61 B.C. L. REV. 2965 (2020).

¹⁰⁴ See *Jones*, 141 S. Ct. at 1311 (summarizing the petitioner’s arguments); *Montgomery v. Louisiana*, 577 U.S. 190, 193–94, 213 (2016); *Miller v. Alabama*, 567 U.S. 460, 465, 479–80 (2012). The *Miller* Court noted that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon . . . because of the great difficulty . . . of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” 567 U.S. at 479–80 (first quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005); and then quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). The *Montgomery* Court added that “*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” 577 U.S. at 209. The *Montgomery* Court suggested that a hearing where the sentencer can consider youth and its attendant characteristics would allow the sentencer to determine which crimes “reflect transient immaturity” and are not appropriate for a life sentence. *Id.* at 210.

¹⁰⁵ *Jones*, 141 S. Ct. at 1315 (citing *Graham*, 560 U.S. at 61).

¹⁰⁶ *Id.* (quoting *Roper*, 543 U.S. at 573).

¹⁰⁷ See *id.* at 1326 (Thomas, J., concurring).

¹⁰⁸ *Id.* (quoting *Montgomery*, 577 U.S. at 209).

¹⁰⁹ *Id.* at 1327.

determine incorrigibility rendered the analysis “untenable and not to be repeated,”¹¹⁰ suggesting that the Court should be careful to avoid similar rulings that might generate unmanageable legal tests in the future.

The Supreme Court has thus elevated manageable legal tests into a prerequisite for adjudicating constitutional disputes. As the following Section shows, federal courts have responded by applying that logic to a wide variety of issues.

B. Federal Courts Citing Rucho’s Manageability Language

Since the Supreme Court decided *Rucho* in 2019, at least four circuit courts of appeal have applied a manageability prerequisite to constitutional adjudication,¹¹¹ with even more district courts following their lead.¹¹² This Section begins by examining cases that have considered applying *Rucho*’s manageability language in the context of environmental law.¹¹³ It then turns to cases in which courts have considered a manageability prerequisite in other contexts such as election law,¹¹⁴ abortion,¹¹⁵ and even the national census.¹¹⁶ Across situations, many courts have readily applied a manageability prerequisite based upon *Rucho*’s language. Finally, this Section examines instances in which courts have rejected *Rucho*.¹¹⁷

1. The Ninth Circuit’s Application of *Rucho* to Environmental Cases in *Juliana v. United States*

The most interesting expansion of *Rucho* beyond election law came in the Ninth Circuit’s decision in *Juliana v. United States*. In *Juliana*, a group of en-

¹¹⁰ *Id.* at 1328.

¹¹¹ *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 438–39 (6th Cir.) (Thapar, J., concurring in part and dissenting in part), *reh’g en banc granted and opinion vacated*, 18 F.4th 550 (6th Cir. 2021) (mem.); *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021), *abrogated by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Bennett v. Metro. Gov’t of Nashville & Davidson Cnty.*, 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, J., concurring); *Jacobsen v. Fla. Sec’y of State*, 974 F.3d 1236 (11th Cir. 2020); *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); *see also* *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347, 385 (5th Cir. 2020) (Ho, J., concurring) (citing to Justice Gorsuch’s dissent in *June Medical Services* to critique the elevation of abortion rights over other health care matters).

¹¹² *Banerian v. Benson*, 589 F. Supp. 3d 735 (W.D. Mich. 2022); *Nelson v. Warner*, 472 F. Supp. 3d 297 (S.D.W. Va. 2020); *Miller v. Hughs*, 471 F. Supp. 3d 768 (W.D. Tex. 2020); *Coal. for Good Governance v. Raffensperger*, No. 1:20-CV-1677-TCB, 2020 WL 6106630 (N.D. Ga. May 26, 2020); *Mecinas v. Hobbs*, 468 F. Supp. 3d 1186 (D. Ariz. 2020), *rev’d*, 30 F.4th 890 (9th Cir. 2022).

¹¹³ *See infra* notes 118–143 and accompanying text.

¹¹⁴ *See infra* notes 144–164 and accompanying text.

¹¹⁵ *See infra* notes 165–171 and accompanying text.

¹¹⁶ *See infra* notes 172–181 and accompanying text.

¹¹⁷ *See infra* notes 182–186 and accompanying text.

vironmental activists alleged that the federal government had permitted and subsidized fossil fuel use, causing a variety of physical, psychological, and property harms.¹¹⁸ Those actions allegedly violated a Fifth Amendment Due Process right to a climate system capable of sustaining human life.¹¹⁹ As relief, the plaintiffs sought an injunction ordering the government to implement a plan to phase out fossil fuel emissions and reduce excess carbon dioxide in the atmosphere.¹²⁰ The government lost a motion to dismiss and subsequently lost a motion to stay the proceedings in the Supreme Court, although the Court noted that “the justiciability of [the plaintiff’s] claims present[ed] substantial grounds for difference of opinion.”¹²¹ The government, however, successfully appealed their summary judgment motion to the Ninth Circuit, which held that the plaintiffs’ requested remedial plan was beyond the authority of an Article III court, and thus the case was nonjusticiable.¹²²

The Ninth Circuit couched its decision in the language of standing doctrine’s redressability prong, but it cited and quoted *Rucho*’s manageability framework to do so. The court focused on the proposed relief—an injunction that would require the government to prepare a plan, subject to judicial approval, to lower harmful emissions.¹²³ Quoting *Rucho*, the court explained that courts can only exercise equitable power by following a “limited and precise” constitutional standard.¹²⁴ Under *Rucho*, courts cannot allocate political power and influence without such standards to guide them.¹²⁵ Just as the *Rucho* Court concluded that mathematical standards to measure the extremity of partisan gerrymandering were too difficult to manage, the *Julianna* court decided that the standards to determine how the government should change its policies to provide a more sustainable atmosphere were unmanageable.¹²⁶ In its view, the plaintiffs failed to provide a plan for how the government could achieve a constitutionally acceptable reduction in atmospheric carbon.¹²⁷ Thus, the court’s language contained hints of both the redressability prong of standing and the political question doctrine’s concern for judicial expansion into legislative mat-

¹¹⁸ 947 F.3d 1159, 1164–65 (9th Cir. 2020).

¹¹⁹ *Id.* at 1165.

¹²⁰ *Id.*

¹²¹ *United States v. U.S. Dist. Ct. for Dist. of Or.*, 139 S. Ct. 1, 1 (2018) (mem.).

¹²² *Juliana*, 947 F.3d at 1164–65; see also Mank, *supra* note 74, at 298–302.

¹²³ *Juliana*, 947 F.3d at 1170. That relief was impossible, the court found, because “it is beyond the power of an Article III court to order, design, supervise, or implement” such a plan. *Id.* at 1171; see also Mank, *supra* note 74, at 300–01; Kemper, *supra* note 77, at 457.

¹²⁴ *Juliana*, 947 F.3d at 1173 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019)).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

ters, but ultimately couched its conclusion in manageability reasoning borrowed directly from *Rucho*.¹²⁸

In dissent, Judge Staton argued that *Rucho*'s discussion of gerrymandering was unrelated to the climate change claims in *Juliana*.¹²⁹ Judge Staton noted that there was no textual delegation of climate change to the political branches, and thus the political question doctrine did not apply.¹³⁰ Instead, the majority's ruling, though couched in terms of redressability, was "grounded exclusively in . . . a (supposed) lack of clear judicial standards for shaping relief."¹³¹ But manageable standards, in Judge Staton's view, did in fact exist; how much fossil fuel emissions will irreparably devastate the country could be determined as a matter of scientific fact.¹³² Judge Staton noted that the Supreme Court has committed to other "widespread, programmatic changes in government functions," such as overhauling prisons in California and racially integrating public schools across the country.¹³³

Moreover, Judge Stanton argued that *Rucho* was not controlling because it addressed the way we elect representatives—the very heart of the political process.¹³⁴ Extending that precedent to other cases that are merely difficult, but not necessarily political, would "threaten[] to eviscerate judicial review in a swath of complicated but plainly apolitical contexts."¹³⁵ Many issues, including diversity in higher education, abortion rights, and the role of religion in our society, would have fallen outside the judicial realm "had the Court imported wholesale *Rucho*'s 'manageable standards' analysis even in the absence of *Rucho*'s inherently political underpinnings."¹³⁶ Thus, Judge Staton worried "that the majority's holding str[uck] a powerful blow to [the court's] ability to hear important cases of widespread concern."¹³⁷

The Ninth Circuit has subsequently attempted to cabin *Juliana*'s reach, though perhaps ineffectively. In the 2022 case, *Mecinas v. Hobbs*, Southern

¹²⁸ See Kemper, *supra* note 77, at 471 ("In its analysis, the court found that, just as the Supreme Court in *Rucho* concluded that judicially manageable standards could not be identified to redress an asserted gerrymandering violation, judicially manageable standards could not be identified to redress the asserted constitutional violations suffered by the *Juliana* plaintiffs.").

¹²⁹ 947 F.3d at 1186 (Staton, J., dissenting).

¹³⁰ *Id.* at 1187. Others have argued that the courts are uniquely well-suited to resolve climate change disputes because of their "superior capacity to cognize and respect intergenerational interests and to appropriately weigh public relations-driven scientific posturing." Kuh, *supra* note 3, at 745.

¹³¹ *Juliana*, 947 F.3d at 1187 (Staton, J., dissenting).

¹³² *Id.*

¹³³ *Id.* at 1188.

¹³⁴ *Id.* at 1190.

¹³⁵ *Id.* Judge Staton argued that the issue would be complex, but "[m]ere complexity . . . does not put the issue out of the courts' reach." *Id.* at 1189.

¹³⁶ *Id.* at 1190.

¹³⁷ *Id.*

District of New York Judge Jed Rakoff, sitting by designation in the Ninth Circuit and writing for the court, refused to apply *Rucho*'s manageability prerequisite to a challenge to a ballot-ordering statute.¹³⁸ In a footnote, Judge Rakoff suggested that *Juliana* had not extended *Rucho* to deem climate change a non-justiciable political question, but instead had determined that the *Juliana* plaintiffs could not meet the redressability element of standing.¹³⁹

It is difficult to predict whether this footnote will stop courts from relying upon *Juliana* and expanding *Rucho*. But prior to the *Mecinas* decision, several courts cited *Juliana* while applying *Rucho*'s manageability prerequisite to issues outside partisan gerrymandering. For instance, the U.S. District Court for the Western District of Texas relied upon *Juliana* to find that a challenge to a ballot-ordering statute was nonjusticiable because there was no manageable standard to determine a "fair" ballot order.¹⁴⁰ This holding stands in direct contrast to *Mecinas*. The District Court for the District of Oregon also relied upon *Juliana* to dismiss claims under the Constitution's Take Care Clause and the Immigration and Nationality Act challenging immigration policies and practices of the Biden Administration.¹⁴¹ Because those claims were based on perceived abuses of executive discretion, the judiciary would be improperly impeding on the executive branch's authority if it were to intervene.¹⁴² Similarly, the Washington Court of Appeals relied upon *Juliana* to hold that it could not require implementation of a climate recovery plan without "resolv[ing] political questions reserved for the executive and legislative branches."¹⁴³

¹³⁸ 30 F.4th 890, 901–02 (9th Cir. 2022).

¹³⁹ Specifically, Judge Rakoff wrote that:

Contrary to the suggestion of the district court, our decision in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), did not extend *Rucho*'s reasoning to find claims related to climate change nonjusticiable under the political question doctrine. Rather, in that case, we found that the plaintiffs could not satisfy the redressability element of standing because the relief sought—"a comprehensive scheme to decrease fossil fuel emissions and combat climate change"—was inconsistent with the limited remedial authority of federal courts sitting in equity.

Id. at 901 n.6 (quoting *Juliana*, 947 F.3d at 1171–73).

¹⁴⁰ *Miller v. Hughs*, 471 F. Supp. 3d 768, 778–79 (W.D. Tex. 2020) (first citing *Juliana*, 947 F.3d at 1173; and then citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019)).

¹⁴¹ *Las Americas Immigr. Advoc. Ctr. v. Biden*, 571 F. Supp. 3d 1173, 1181 (D. Or. 2021).

¹⁴² *Id.*

¹⁴³ *Aji P. ex rel. Piper v. State*, 480 P.3d 438, 449 (Wash. Ct. App. 2021) (discussing with approval *Juliana*). *But see* *Nelson v. Warner*, 472 F. Supp. 3d 297, 311–12 (S.D.W. Va. 2020) (refusing to extend *Rucho* and *Juliana* to dismiss a challenge to a ballot-ordering statute); *Santa Fe All. for Pub. Health & Safety v. Santa Fe*, No. 18-1209 KG/JHR, 2020 WL 2198120, at *2, *5–6 (D.N.M. May 6, 2020) (refusing to extend *Juliana* to claim for damages allegedly caused by radio frequency waves emitted by cell phone towers).

2. Election Cases Relying upon *Rucho*

Several circuit courts have relied upon *Rucho* to find election law issues nonjusticiable. In *Jacobson v. Florida Secretary of State*, the Eleventh Circuit applied *Rucho*'s manageability framework to a Florida ballot-ordering statute.¹⁴⁴ The *Jacobson* court initially held that the plaintiffs, several groups of Florida voters, lacked standing because they failed to prove that the defendant Secretary of State caused an injury in fact by enforcing the ballot-ordering statute.¹⁴⁵ The court then held, alternatively, that the issue was a nonjusticiable political question.¹⁴⁶ Citing *Rucho*, the court reasoned that “[n]o judicially discernable and manageable standards exist to determine what constitutes a ‘fair’ allocation of the top ballot position, and picking among the competing visions of fairness ‘poses basic questions that are political, not legal.’”¹⁴⁷

Similarly, in *Luft v. Evers*, the Seventh Circuit addressed several Wisconsin voting laws, including a reduction of hours for absentee voters that the plaintiffs alleged would have a disparate impact on Black voters.¹⁴⁸ The court reasoned that the provision did not reflect unconstitutional racial discrimination, but instead showed constitutional consideration of politics when changing the rules about voting.¹⁴⁹ That political party affiliation largely tracked race was largely irrelevant; *Rucho* held that challenges to the consideration of politics in setting election rules was nonjusticiable.¹⁵⁰

At the circuit level, courts in some cases have declined to extend *Rucho*'s manageability prerequisite to all election law litigation. For instance, the Ninth Circuit held that *Rucho*'s manageability framework applied only to partisan gerrymandering claims, not ballot-ordering challenges.¹⁵¹ A ballot-ordering claim “does not present the sort of intractable issues that arise in partisan gerrymandering cases[,]” according to the Ninth Circuit.¹⁵² Similarly, the Fifth Circuit held that a challenge to Texas voting procedures during the COVID-19

¹⁴⁴ 974 F.3d 1236, 1242 (11th Cir. 2020).

¹⁴⁵ *Id.* at 1241.

¹⁴⁶ *Id.* at 1242, 1261.

¹⁴⁷ *Id.* at 1242 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019)).

¹⁴⁸ 963 F.3d 665, 670 (7th Cir. 2020).

¹⁴⁹ *Id.* at 670–71 (citing *Rucho*, 139 S. Ct. at 2484).

¹⁵⁰ *Id.* at 671 (discussing *Rucho*'s implications for legislators).

¹⁵¹ *Mecinas v. Hobbs*, 30 F.4th 890, 901–02 (9th Cir. 2022).

¹⁵² *Id.* at 902. The *Mecinas* opinion—authored by Southern District of New York Judge Jed S. Rakoff, sitting by designation—attempted to repudiate the Ninth Circuit's application of *Rucho*'s manageability framework to environmental cases. *Id.* at 902 n.6 (noting that *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), did not extend *Rucho* “to find claims related to climate change nonjusticiable under the political question doctrine,” but instead relied upon the redressability element of standing doctrine).

pandemic was justiciable, despite *Rucho*.¹⁵³ Finally, the Fourth Circuit determined that a challenge to South Carolina's appointment of presidential electors on a winner-take-all basis was justiciable.¹⁵⁴ The court noted that prior Supreme Court decisions had deemed challenges to the appointment process for electors justiciable, then held that *Rucho*'s manageability concerns in extreme partisan gerrymandering cases did not extend to such challenges.¹⁵⁵

At the district court level, several judges have applied *Rucho*'s manageability prerequisite to election law disputes and reached different conclusions. Both the U.S. District Courts for the District of Arizona and the Western District of Texas have applied *Rucho*'s manageability test to find that challenges to ballot-ordering statutes are nonjusticiable political questions.¹⁵⁶ Those courts noted that the Ninth Circuit had recently applied *Rucho* to a climate change case,¹⁵⁷ and held that the plaintiffs' claims that the ballot-ordering statutes were "unfair" did not in and of themselves create a judicially manageable standard.¹⁵⁸ Similarly, the U.S. District Court for the Western District of Michigan found a challenge to a congressional districting plan that diluted the strength of "communities of interest" was nonjusticiable under *Rucho*'s manageability framework.¹⁵⁹ By contrast, the U.S. District Court for the Southern District of West Virginia also applied *Rucho*'s manageability framework to a ballot-order case, though it found that controversy justiciable because "decades of precedent" provided manageable tests to adjudicate such claims.¹⁶⁰ The court noted that the extreme partisan gerrymandering at issue in *Rucho* was a "rare circumstance" where manageability concerns, and thus the political question doctrine, applied.¹⁶¹

During the COVID-19 pandemic, two district courts split on *Rucho*'s applicability to claims for greater voting procedure safeguards. First, the U.S. Dis-

¹⁵³ *Mi Familia Vota v. Abbott*, 977 F.3d 461, 463–64, 466–67 (5th Cir. 2020). The plaintiffs claimed that Texas's voting procedures did not do enough to protect minority voters from infection and effectively infringed upon their right to vote. *Id.* at 464. They sought an injunction requiring Texas Governor Greg Abbott to implement further protective orders and extend other voting options. *Id.* at 464–65. The court held that *Rucho*'s manageability concerns did not apply because the court had previously established clear standards to adjudicate such Section 2 claims under the Voting Rights Act. *Id.* at 467.

¹⁵⁴ *Baten v. McMaster*, 967 F.3d 345, 348, 351–52 (4th Cir. 2020).

¹⁵⁵ *Id.* at 351–52.

¹⁵⁶ *Mecinas v. Hobbs*, 468 F. Supp. 3d 1186, 1209 (D. Ariz. 2020), *rev'd*, 30 F.4th 890 (9th Cir. 2022); *Miller v. Hughs*, 471 F. Supp. 3d 768, 778–79 (W.D. Tex. 2020). Importantly, the District of Arizona was reversed on appeal by a Ninth Circuit that was determined to limit *Rucho* to cases involving partisan gerrymanders. *Mecinas*, 30 F.4th at 901–02.

¹⁵⁷ *Juliana*, 947 F.3d at 1159.

¹⁵⁸ *Mecinas*, 468 F. Supp. 3d at 1208–09; *Miller*, 471 F. Supp. 3d at 779.

¹⁵⁹ *Banerian v. Benson*, 589 F. Supp. 3d 735, 736 (W.D. Mich. 2022).

¹⁶⁰ *Nelson v. Warner*, 472 F. Supp. 3d 297, 312–13 (S.D.W. Va. 2020).

¹⁶¹ *Id.* at 310 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019)).

trict Court for the Northern District of Georgia held that there were no manageable standards to determine the appropriate safeguards for voting during a pandemic, relying upon *Rucho*'s manageability language.¹⁶² But just months later, the U.S. District Court for the Middle District of Louisiana explicitly rejected that analysis, finding that it could adjudicate the constitutionality of the state's emergency election plan.¹⁶³ Though the cases considered emergency election proposals that differed significantly in scope,¹⁶⁴ the inconsistency demonstrates how elusive the test for discovering manageable judicial tests really is.

3. *Rucho*'s Manageability Framework in Abortion Cases

Rucho's manageability framework has also appeared in circuit court decisions addressing abortion rights. In *Memphis Center for Reproductive Health v. Slatery*, the Sixth Circuit affirmed an injunction against enforcing Tennessee statutes that would have criminalized pre-viability abortions, and based its decision on the undue burden test that the *Casey* Court created.¹⁶⁵ Judge Thapar filed an opinion concurring in the result under *Roe v. Wade* and *Casey*, but dissenting on the grounds that those decisions were constitutionally incorrect.¹⁶⁶ Though his critique was extensive, Judge Thapar relied upon *Rucho*'s manageability framework in part to suggest that *Roe* and *Casey* dealt with nonjusticiable political questions.¹⁶⁷ Judge Thapar cited Justice Gorsuch's claims in *June Medical Services* that abortion jurisprudence was "standardless decisionmaking . . . at its apex."¹⁶⁸ Abortion jurisprudence "forces an arbitrary and policy-laden decision at every turn," according to Judge Thapar.¹⁶⁹ Thus, as Chief Justice Roberts noted in *June Medical Services*, abortion cases require balancing personal values.¹⁷⁰ According to Chief Justice Roberts, the undue burden test on which those cases relied is both "hopelessly unworkable" for stare decisis purposes and not a "judicially manageable standard" under *Rucho*'s justiciability analysis.¹⁷¹

¹⁶² *Coal. for Good Governance v. Raffensperger*, No. 1:20-CV-1677-TCB, 2020 WL 6106630, at *1–3 (N.D. Ga. May 26, 2020).

¹⁶³ *Harding v. Edwards*, 484 F. Supp. 3d 299, 306–08 (M.D. La. 2020).

¹⁶⁴ *See id.* at 307 ("[T]he relief sought by the plaintiffs in [*Coal. for Good Governance*] was significantly more expansive than what Plaintiffs herein seek.").

¹⁶⁵ 14 F.4th 409, 414–15, 423–24 (6th Cir. 2021), *reh'g en banc vacated and restored as pending appeal*, 18 F.4th 550 (6th Cir. 2021) (mem.).

¹⁶⁶ *Id.* at 438–39 (Thapar, J., concurring in part and dissenting in part).

¹⁶⁷ *Id.* at 456.

¹⁶⁸ *Id.* at 451 (quoting *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2179 (2020) (Gorsuch, J., dissenting), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)).

¹⁶⁹ *Id.* at 452.

¹⁷⁰ *Id.* at 455 (quoting *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring)).

¹⁷¹ *Id.* at 456 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting)) (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496–98 (2019)).

4. *Rucho*'s Manageability Framework in a Census Case

In *National Urban League v. Ross*, the plaintiffs challenged the U.S. Census Bureau's plan to advance deadlines for the 2020 census, arguing that this violated the Constitution's Enumeration Clause and the Administrative Procedure Act.¹⁷² After the plaintiffs obtained a preliminary injunction from a district court, the government filed for an emergency stay of that injunction pending appeal.¹⁷³ The Ninth Circuit rejected that administrative stay,¹⁷⁴ but in dissent, Judgeumatay argued that the injunction itself was beyond the power of the district court because the case was nonjusticiable.¹⁷⁵ Judgeumatay cited to *Rucho*'s holding that extreme partisan gerrymandering is a nonjusticiable political question, then added that "determining the 'accuracy' of the census is no more of a judicial question than determining the 'fairness' of districting maps."¹⁷⁶ In his view, there were no "judicially discoverable and manageable standards" to determine the accuracy of a census.¹⁷⁷ Because the judiciary would not be "equipped" to make that accuracy determination, the controversy was a nonjusticiable political question.¹⁷⁸

Notably, the Northern District Court of California rejected Judgeumatay's application of the political question doctrine when the case returned to the court on the defendants' motion to dismiss.¹⁷⁹ The district court asserted that no decision had applied the political question doctrine to such a census controversy before, and that the Census Act provided a discoverable and manageable standard to review the Census Bureau's plan in this instance.¹⁸⁰ It thus rejected the defendants' analogy to *Rucho* and denied their motion to dismiss.¹⁸¹

5. Rejections of *Rucho*

Not all federal courts have readily adapted a broad manageability prerequisite in constitutional litigation. For example, the Seventh Circuit rejected an argument that a consent decree to monitor political patronage practices in Chicago was unmanageable under *Rucho*.¹⁸² The court held that political patronage

¹⁷² 977 F.3d 698, 700 (9th Cir. 2020).

¹⁷³ *Id.* at 700–01.

¹⁷⁴ *Id.* at 703.

¹⁷⁵ *Id.* at 707–10 (umatay, J., dissenting).

¹⁷⁶ *Id.* at 708–09.

¹⁷⁷ *Id.* at 708 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

¹⁷⁸ *Id.* at 710.

¹⁷⁹ *Nat'l Urb. League v. Ross*, 508 F. Supp. 3d 663, 686 (N.D. Cal. 2020).

¹⁸⁰ *Id.* at 686–87.

¹⁸¹ *Id.*

¹⁸² *Shakman v. Clerk of Cook Cnty.*, 994 F.3d 832, 842 (7th Cir. 2021).

violates the freedom of association protected by the First Amendment, and the test for analyzing such violations is well-established and akin to the manageable strict scrutiny test.¹⁸³ Similarly, the District Court for the District of Oregon rejected an argument for nonjusticiability under *Rucho* as applied to a temporary restraining order against the state legislature.¹⁸⁴ The District Court for the Northern District of Florida rejected the defendant's analogy of a challenge to voting procedures to *Rucho*'s extreme partisan gerrymandering claims.¹⁸⁵ The District Court for the Southern District of New York also found *Rucho*'s manageability prerequisite inapplicable to the question of constitutional limits on the amount of offsets plaintiffs could take against state and local taxes.¹⁸⁶

C. Federal Courts Citing *June Medical Services*

In the circuit courts, where decisions have cited *June Medical Services* thirty-three times to date, most of the discussion has focused on how to interpret the fractured opinion and whether to follow the plurality's analysis or Chief Justice Roberts's concurrence. But various courts have discussed the dissent's affinity for clear-cut, manageable legal tests in refusing to adjudicate new legal controversies. Those cases suggest that courts may use *June Medical Services* to undermine legal tests outside the abortion context.

Several circuit court opinions seize upon Justice Gorsuch's general distaste for abortion precedents, with some suggestion that the tests at issue are too malleable for lower courts to apply. For instance, in 2021, in *Preterm-Cleveland v. McCloud*, the Sixth Circuit complained about the lack of clear guidance on how to decide if an abortion regulation is facially invalid because it poses an undue burden in a "large fraction" of cases.¹⁸⁷ The Supreme Court had failed to clearly define the denominator of that fraction—the number of women affected by the regulation—or establish a threshold level at which the fraction would be too large for the statute to remain in place.¹⁸⁸ The court cited to Justice Gorsuch's *June Medical Services* dissent, where he criticized that

¹⁸³ *Id.*

¹⁸⁴ *Hernandez v. Or. Legis.*, 521 F. Supp. 3d 1025, 1034 (D. Or. 2021).

¹⁸⁵ *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1268 (N.D. Fla. 2020). The court did not believe that the variety of voting procedure challenges raised—which included requirements for voters to pay postage and meet deadlines for mail-in ballots—was automatically outside federal court jurisdiction following *Rucho*'s manageability holding. *Id.* The court thus allowed portions of the plaintiffs' claims to go forward, surviving a motion to dismiss. *Id.* at 1268–69.

¹⁸⁶ *New York v. Mnuchin*, 408 F. Supp. 3d 399, 414–15 (S.D.N.Y. 2019). The court noted that "familiar tools of constitutional interpretation" would allow it to determine whether the statute at issue overstepped constitutional bounds. *Id.* at 414.

¹⁸⁷ 994 F.3d 512, 534 (6th Cir. 2021), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁸⁸ *Id.*

test as “circular” and “unlike anything we apply to facial challenges anywhere else.”¹⁸⁹ Following that citation, the Sixth Circuit applied the large fraction test as a conceptual guide rather than a mathematical formula, ultimately upholding an abortion restriction in Ohio.¹⁹⁰

The Sixth Circuit also relied on Justice Gorsuch’s manageability language outside the abortion context in 2020, in *Bennett v. Metropolitan Government of Nashville and Davidson County*.¹⁹¹ That case concerned a public employee’s claim that an employer violated his First Amendment rights by firing him for using racially charged language on social media.¹⁹² In a concurring opinion, Judge Murphy criticized legal tests that attempt to balance employer and employee interests in such cases, noting that such a “utilitarian calculus” is typically reserved for legislators rather than courts engaging in “ad hoc balancing of relative social costs and benefits.”¹⁹³ The decision thus illustrates how federal courts might use language from *June Medical Services* to undermine legal tests outside the abortion context.¹⁹⁴

III. MANAGEABILITY’S MISSING MERIT

As discussed above, the manageability prerequisite has grown in recent years as lower courts have followed the Supreme Court’s lead in refusing to adjudicate extreme partisan gerrymandering. In 2020, in *Rucho v. Common Cause*, the Supreme Court decided that it could not discern mathematical standards that would be satisfactory to adjudicate the case. It did not, however, hold that mathematical (or scientific) difficulties in creating appropriate standards divest jurisdiction in any context. Such an expansive reading of *Rucho* would “permit the ‘political question’ exception to swallow the rule.”¹⁹⁵

¹⁸⁹ *Id.* (quoting *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2176 (2020) (Gorsuch, J., dissenting), *abrogated by Dobbs*, 142 S. Ct. 2228).

¹⁹⁰ *Id.* at 535; *see also* *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs. v. Kauffman*, 981 F.3d 347, 385 (5th Cir. 2020) (Ho, J., concurring) (citing to Justice Gorsuch’s dissent in *June Medical Services* to critique the elevation of abortion rights over other healthcare matters); *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 451–52 (6th Cir.) (Thapar, J., concurring in part and dissenting in part) (relying upon Justice Gorsuch’s *June Medical Services* dissent to decry abortion jurisprudence as unpredictable and standardless), *reh’g en banc granted and opinion vacated*, 18 F.4th 550 (6th Cir. 2021) (mem.).

¹⁹¹ 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, J., concurring).

¹⁹² *Id.* at 533 (majority opinion).

¹⁹³ *Id.* at 553 (Murphy, J., concurring) (quoting *June Med. Servs.*, 140 S. Ct. at 2136, 2179 (Roberts, C.J., concurring, and Gorsuch, J., dissenting)).

¹⁹⁴ District courts’ citations of *June Medical Services* have been omitted from this discussion, as they focus largely upon determining which opinion is controlling and the application of that selected opinion to similar facts.

¹⁹⁵ *Juliana v. United States*, 947 F.3d 1159, 1190 (9th Cir. 2020) (Staton, J., dissenting).

This Part argues that expansion of the manageability prerequisite is both unnecessary and undesirable for three reasons. First, Section A argues that expanding the prerequisite is an unnecessary ex ante check on inappropriate legal tests in light of the ex post error-correction mechanism contained in the workability prong of stare decisis analysis.¹⁹⁶ Second, Section B makes the case that manageability needlessly expands judicial discretion in ways unlikely to be resolved by judges deploying fundamentally opposed interpretive methods.¹⁹⁷ Finally, Section C discusses why some unmanageability in legal tests is normatively desirable.¹⁹⁸

A. Manageability and Workability: An Undertheorized (and Unnecessary) Relationship

The manageability prerequisite and the workability prong of stare decisis analysis are analytically related in undertheorized ways. The relationship has yet to be explored fully in the academic literature, though some judges have noted it in their decisions. For example, in criticizing abortion jurisprudence, Judge Thapar of the Sixth Circuit argued that “[t]he undue burden test is ‘hopelessly unworkable in practice’ . . . [a]nd it is unworkable because it is neither a clear rule nor a judicially manageable standard.”¹⁹⁹ That relationship also came to the fore, as noted above, when the majority in *Dobbs v. Jackson Women’s Health Organization* relied heavily upon the critiques of the undue burden test that Justices Gorsuch and Thomas outlined when critiquing a developing legal test in 2020 in *June Medical Services v. Russo*.²⁰⁰ In many ways, workability and manageability are two sides of the same coin.

Manageability allows judges to disqualify a legal test ex ante by suggesting that courts should not intervene where they cannot discern a straightforward legal test. When judges enforce the manageability prerequisite, they preclude a new legal test from developing in the lower courts. There is no opportunity for that test to percolate among colleagues who will refine it into a helpful guide for adjudicating disputes. Ex ante manageability decisions preclude judicial innovation, preserving a status quo that judges may have preferred on policy grounds all along.

¹⁹⁶ See *infra* notes 199–214 and accompanying text.

¹⁹⁷ See *infra* notes 215–221 and accompanying text.

¹⁹⁸ See *infra* notes 222–232 and accompanying text.

¹⁹⁹ *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 456 (6th Cir.) (Thapar, J., concurring in part and dissenting in part) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 955 (Scalia, J., dissenting)) (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496–98 (2019)), *reh’g en banc granted and opinion vacated*, 18 F.4th 550 (6th Cir. 2021) (mem.).

²⁰⁰ See *supra* notes 85–110 and accompanying text.

Workability achieves a similar result, but does so through ex post review of a test that had the opportunity to develop in lower courts. In its strong form, stare decisis doctrine holds that a precedent should stand unless there is some “special justification” to overrule it, regardless of the quality of its reasoning.²⁰¹ One such special justification is whether the rule “def[ies] practical workability,” rendering it unusable for judges and requiring reversal.²⁰² That version of stare decisis in difficult constitutional cases permits courts to adjudicate a thorny issue, outline a provisional legal test, and then return to the decision in the future to determine if the provisional test has defied practical workability. Although the manageability prerequisite precludes new constitutional precedent, reliance on workability would allow provisional development with a clear ex post mechanism for error correction.

1. Eschewing Manageability

The relationship between the manageability prerequisite and the workability prong of stare decisis demonstrates why the former is unnecessary. Manageability is a superfluous limitation on adjudication for at least four reasons: 1) workability, not manageability, can correct substantively inaccurate decisions; 2) manageability rulings are necessarily speculative; 3) manageability rulings rely upon an inconsistent (and perhaps unknowable) “[s]tandard for [s]tandards;”²⁰³ and 4) manageability is a one-way ratchet towards greater concentration of constitutional power in the political branches.

First, a manageability prerequisite is not needed to control substantively inaccurate judicial decisions. If judges worry that judicial resolution of certain kinds of legal problems will likely be either incomprehensible or substantively undesirable, the workability prong of stare decisis analysis addresses both concerns. Workability comes into play only when some Justices are considering overruling precedent because they believe the underlying decision is substantively inaccurate, even egregiously so.²⁰⁴ Workability can operate as a required

²⁰¹ Starger, *supra* note 14, at 29 (describing the “strong conception[] of stare decisis” as that which “requires a ‘special justification’ for overruling beyond mere belief that the challenged precedent was ‘wrongly decided’” (citations omitted)). An emerging, “weaker” conception of stare decisis posits, alternatively, that “bad reasoning” in a prior decision is not merely a condition precedent to stare decisis analysis, but also a substantive consideration that may itself justify a reversal. *Id.*; see also Gentithes, *supra* note 14, at 87–88.

²⁰² *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); see also Starger, *supra* note 14, at 39; Gentithes, *supra* note 14, at 87–88.

²⁰³ Gentithes, *supra* note 2, at 1100.

²⁰⁴ Gentithes, *supra* note 14, at 116–18.

review of the substantive accuracy of a prior decision.²⁰⁵ With that substantive review already promised under *stare decisis* doctrine, there is little need for an additional manageability prerequisite to serve the same function *ex ante*.

Second, manageability rulings are speculative predictions of the future repercussions of a possible decision. Judges enforcing a manageability prerequisite will be acting in an information vacuum. They may have a strong intuition about the value of judicial intervention, but that intuition will lack support in terms of data about the real-world repercussions of adjudicating a vexing constitutional issue. Though manageability and workability operate similarly, only manageability allows courts to avoid legal issues based upon speculation, rather than data that lower courts obtain by implementing a legal test. Manageability allows judicial fear of an unworkable decision to predominate over the merits of a constitutional claim. Neither *stare decisis* nor judicial humility requires such stifling caution. Not every judicial intervention will prove worthwhile. But some will. Manageability requires judges to stay their hands when operating on intuitive guesses about the results of adjudication. Eschewing manageability removes the guesswork in favor of reasoned doctrinal development on an *ex post* basis.

Third, manageability rulings will be based upon varying and inconsistent definitions of that “standard for standards.” As I have argued elsewhere, when the Supreme Court relied upon manageability to sidestep extreme partisan gerrymandering cases, it used plainly contradictory criteria for what a manageable test should be.²⁰⁶ The Court alternated between requiring mathematical precision and greater flexibility, creating a “standard for standards” that is so hopelessly opaque that it appears, for lack of a better term, unworkable. There is little hope for a clearer definition of manageability if judges apply that prerequisite broadly. Manageability affords judges wide discretion to avoid adjudication with little guidance on how to wield it.²⁰⁷ Judges will always struggle to reach agreement on what kinds of legal tests are most appropriate when their interpretive methodologies are fundamentally opposed. Take, for example, the attempt to define Article III standing, which countless commentators have described as hopelessly arbitrary and based largely on policy preferences.²⁰⁸ Sidestepping doctrines like standing and manageability quickly become discretionary and incomprehensible to lower courts and litigants.

Finally, manageability is a one-way ratchet towards greater concentration of constitutional power in the political branches, ebbing away at any realistic

²⁰⁵ Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971, 1992 (2021).

²⁰⁶ Gentithes, *supra* note 2, at 1098–103 (collecting sources).

²⁰⁷ See *infra* notes 215–221 and accompanying text.

²⁰⁸ See, e.g., Re, *supra* note 1, at 1195 n.20; Nichol, *supra* note 1, at 324–30.

check the judiciary might wield. As the courts hold that more and more issues cannot pass the manageability prerequisite, they leave more and more constitutional issues entirely within the ambit of the political branches. Doctrine will not develop around those issues; courts will never set limitations on the ways in which the political branches might constitutionally address those issues.²⁰⁹ The manageability prerequisite pushes power away from the judiciary and towards the political branches, without a corresponding avenue for that authority ever to return. As the weakest branch becomes even weaker, our constitutional system will have less and less control of power-hungry actors in the political branches.

2. A Grand Bargain

In light of these normative flaws in manageability, perhaps a grand bargain between manageability and workability is in order. Though this Article does not agree with the Court's decision in *Dobbs*—which I have argued elsewhere relies too much on the claim that *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* were “poor[ly] reason[ed]” as grounds for overturning those decisions²¹⁰—there is a positive to draw from a decision that relies upon unworkability to justify a change in course from an existing legal test. Such an approach could be an acceptable tradeoff for Justices concerned that the courts are addressing too many constitutional controversies and taking on an inappropriately activist role. Those Justices might agree to adjudicate important legal controversies more frequently and promote a robust federal judiciary by removing the manageability prerequisite, as long as they can maintain a robust workability requirement within stare decisis doctrine. Removing the manageability prerequisite would allow the Justices to create provisional legal tests to address new issues, then monitor lower courts' application and refinement of those legal tests over time. That monitoring function would operate as a meaningful check upon legal tests and judicial interventions that prove impossibly difficult for lower court judges to implement. Rather than precluding courts ex ante from addressing complex legal issues, this ap-

²⁰⁹ This process is similar to the one-way ratchet that David Driesen has identified in the “political remedies doctrine,” which suggests that the Supreme Court cannot adjudicate a separation of powers claim until both political branches—those are, the executive and legislative branches—have asserted, and possibly exhausted, their rights. David M. Driesen, *The Political Remedies Doctrine*, 71 EMORY L.J. 1, 3 (2021). That doctrine funnels power exclusively to the President and, “while framed in neutral terms, only bars review of presidential action, not congressional acts.” *Id.* at 30. Accordingly, this ratchet “allows the courts to overturn political agreements between Congress and the President . . . while permitting unilateral presidential usurpation of congressional authority to go unchecked if the President commands enough support in Congress to block legislation.” *Id.*

²¹⁰ Michael Gentithes, *Will Dobbs (and Janus) Overrule Stare Decisis?*, APP. ADVOC. BLOG (May 10, 2022), https://lawprofessors.typepad.com/appellate_advocacy/2022/05/will-dobbs-and-janus-overrule-stare-decisis.html [<https://perma.cc/XUD9-Z8E8>].

proach promotes a robust role for the courts while providing an escape hatch from controversies that, upon *ex post* review, should not have been resolved judicially.

To be clear, I disagree with judges that seek to shrink the federal judiciary's role in constitutional controversies. But given the current trend towards limiting justiciability in general, a tradeoff that limits the manageability prerequisite in exchange for strengthening the workability factor of *stare decisis* is desirable. Doing so would relieve the pinch that litigants currently feel from courts that often refuse to resolve novel legal controversies. As the standing hurdle has grown more significant, and the political question doctrine has precluded additional forms of constitutional litigation, the manageability prerequisite threatens to tip the balance so far towards judicial minimalism as to undermine the least dangerous branch's meaningful role in our constitutional system. Reducing or eliminating the manageability prerequisite while allowing more frequent reversals through the workability requirement may be worth the costs of legal instability that come with a weakened version of *stare decisis*.

As an example of this potential tradeoff, consider a hypothetical case involving gun control measures, typically favored by liberal politicians. Suppose that, in the wake of a series of deadly mass shootings across the country and threats posed to Supreme Court Justices in their homes and workplaces, Congress passes new legislation that would forbid carrying firearms within a certain distance of a Justice's home or workplace. Subsequent lawsuits challenge those regulations as unconstitutional restrictions on Second Amendment rights, and the issue eventually reaches the Supreme Court. Justices who personally favor gun safety measures may be tempted to rely upon sidestepping doctrines like manageability to avoid answering the question, thereby maintaining a status quo that upholds gun safety laws generally favored by the Court's liberal wing. And there may be grounds to claim that judicial intervention would be unwise, if not unmanageable. The Supreme Court has never fully defined those "sensitive places" in which regulation of the right to bear arms is constitutionally permissible,²¹¹ leading to confusion among the circuit courts on the limits of such gun control measures,²¹² and further debate among the Justices over how to define such sensitive places.²¹³

²¹¹ See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (noting that regulation of the right to bear arms may be constitutional when laws "forbid[] the carrying of firearms in sensitive places such as schools and government buildings").

²¹² Compare *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125–26 (10th Cir. 2015) (holding that postal service parking lots are not sensitive places where limitations on carrying firearms are constitutional), with *GeorgiaCarry.org, Inc. v. U.S. Army Corps. of Eng'rs*, 212 F. Supp. 3d 1348, 1362 (N.D. Ga. 2016) (holding that dams and related structures are such sensitive places where firearm regulations are constitutional), and *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 369–70 (Va. 2011) (finding that George Mason University is a sensitive place based on *Heller*'s

Despite those temptations, the Court could rely upon the grand bargain described in this Article to attempt to resolve the case.²¹⁴ The Justices could try to announce a more refined and workable definition of the sensitive places where gun safety measures are permissible. Admittedly, that effort may fail; the Justices may be forced to create an unwieldy test that lower courts would struggle to implement in any consistent way. But the Court could always return to the issue and reject its own prior ruling under the workability prong of stare decisis analysis. The effort would nonetheless be worthwhile; it would potentially resolve a pressing constitutional impasse confronting the nation. And it could be done without creating an unrealistic and immobilizing manageability prerequisite that will keep far too many plaintiffs out of the federal courthouse.

Accepting this kind of tradeoff between the manageability prerequisite and the workability prong of stare decisis might be a better strategy for those who ultimately oppose judicial resolution of a given issue. Those in opposition may be convinced that the legal question, or particular legal test devised to resolve it, is likely to prove unworkable. But allowing experimentation that demonstrates that failure, rather than vociferously opposing its implementation from the outset, may be a better strategy. That kind of entrenched opposition puts those who support judicial resolution of the issue into entrenched support. On the other hand, if both sides can agree to experiment with judicial resolution, then reevaluate the results in lower courts through workability review, there is a better chance of reasoned judicial discussion and a normatively desirable outcome. This approach both increases access to the courthouse and lowers the political temperature within the judiciary.

B. Manageability and Discretion

Though precedent is generally thought to reduce judicial discretion, one powerful critique of the Supreme Court's current stare decisis doctrine is that it actually generates judicial discretion. William Baude has argued that precedent should restrain judges in new cases with similar facts, forcing them to reach results that align with past practice.²¹⁵ Instead, stare decisis doctrine often ex-

recognition of schools as sensitive places, and despite *Heller*'s failure to fully define a "sensitive place" (citing *Heller*, 554 U.S. at 626–28)); see also Gentithes, *supra* note 2, at 1108–11 (discussing *Heller* and lower courts' interpretations of "sensitive places").

²¹³ Compare *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2134 (2022) ("[E]xpanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly."), with *id.* at 2181 (Breyer, J., dissenting) ("So where does that leave the many locations in a modern city with no obvious 18th- or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums?").

²¹⁴ See *supra* notes 210–213 and accompanying text.

²¹⁵ William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 313.

pands a judge's discretion to either uphold or overrule precedent.²¹⁶ This is especially true of the stare decisis theories posited by some originalist judges, such as Justice Thomas, that suggest that judges have an affirmative constitutional duty to overrule "demonstrably erroneous" precedent, but also discretion to follow precedent that is not so demonstrably erroneous.²¹⁷ Such views offer little guidance for judges to determine when precedent can be overruled, especially where one Justice's "demonstrably erroneous" is likely to be another's "perfectly acceptable," given their conflicting interpretive approaches to constitutional adjudication.²¹⁸

The manageability prerequisite, left unchecked, would similarly expand judicial discretion at all levels of federal courts. There is a growing catalogue of decisions that have relied upon manageability to sidestep constitutional controversies.²¹⁹ This trend demonstrates the breadth of a potential manageability prerequisite. Nothing in current manageability doctrine suggests limitations on its scope.²²⁰ The prerequisite could quickly become a significant hurdle for a wide swath of litigants.

²¹⁶ *Id.* at 314.

²¹⁷ *Id.* at 319–23 (discussing Justice Thomas's concurring opinion in *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019)).

²¹⁸ This phenomenon was aptly described by Randy Kozel in his book on stare decisis and the challenge of crafting a doctrine among Justices with fundamentally opposed interpretive methods. KOZEL, *supra* note 21, at 102; *see also* Gentithes, *supra* note 2, at 89; Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 140. This presents a particularly thorny problem for originalists, who in part seek to limit judicial discretion in decision-making. Michael Gentithes, *Rulifying Reasonable Expectations: Why Judicial Tests, Not Originalism, Create a More Determinate Fourth Amendment*, 59 HOUS. L. REV. 1, 9 (2021) ("Originalists argue that their method of interpretation significantly limits judicial discretion, constraining judges to rule in accordance with the original intent, however defined, behind constitutional clauses."); *see, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989) ("Originalism does not aggravate the principal weakness of the [constitutional] system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971) ("The Supreme Court's constitutional role appears to be justified only if the Court applies principles that are neutrally derived, defined and applied."); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 9 (1982) ("The problem thus arises whether, given the principle of electorally accountable policymaking, judicial review is legitimate."); Raoul Berger, *Ely's "Theory of Judicial Review"*, 42 OHIO ST. L.J. 87, 87 (1981) ("[A]ctivist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people's representatives . . ."); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610 (2008) (arguing that originalism aims to "minimize[] the role contested judgments play in constitutional interpretation"); Baude, *supra* note 215, at 331–33 (discussing the "new approaches to precedent" or stare decisis doctrine).

²¹⁹ *See supra* notes 79–194 and accompanying text.

²²⁰ As Judge Staton argued in *Juliana v. United States*, the Supreme Court has not, to date, held that "mathematical (or scientific) difficulties in creating appropriate standards divest jurisdiction in any context. Such an expansive reading . . . would permit the 'political question' exception to swallow the rule." 947 F.3d 1159, 1190 (9th Cir. 2020) (Staton, J., dissenting).

If manageability expands, it will do so in a series of wholly discretionary rulings by federal judges with little consistency or clarity provided for litigants. To date, the various courts that have applied a manageability prerequisite have not settled upon a clear definition of “manageability” or a meaningful guide for when future judges should deploy such a test. The discussion in Part II illustrates the conflicting views, as some judges favor applying the manageability prerequisite in a variety of contexts beyond recent partisan gerrymandering litigation, or even election law cases as a whole.²²¹ Early manageability rulings likewise struggle to explain exactly what makes a legal test unmanageable, especially when that manageability prerequisite is applied to a test that has never been deployed by judges in practice. Manageability, then, creates a broad avenue for purportedly minimalist judges to maximize their influence and preserve the status quo in innumerable cases without any clear or systematic limitation.

C. Useful Unmanageability

This Article’s earlier discussion of the close ties between manageability and workability omitted one key distinction: Although the manageability prerequisite requires inflexible rules, workability review permits courts to adopt either a flexible standard or a hard-edged rule when wading into a new area of jurisprudence. Hard-edged rules and flexible standards are part of a continuum of possible norms that vary in their stringency and impact.²²² Both have their own benefits and limitations. Rules garner “uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes”; in contrast, standards create “nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs.”²²³ Rules are an unyielding reflection of the norm-creator’s choices, whereas standards leave most of the choices to the norm’s subjects, enforcers, and interpreters, at the moment of application.²²⁴

²²¹ See *supra* notes 79–194 and accompanying text.

²²² Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 163 (2017) (“[T]he rule/standard distinction reflects a continuum, rather than a sharp binary division.”).

²²³ Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014); see also Elkin-Koren & Fischman-Afori, *supra* note 222, at 168 (“While rules offer a higher level of certainty and predictability *ex ante*, standards give the court a broad range of discretion to define the content of the norm *ex post*. This presumably makes standards less predictable, since they provide relatively little guidance for prospective users, *ex ante*.”).

²²⁴ Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 803–04 (2005). Decision-makers tend to resist both extremes, avoiding unnecessarily hard-edged rules and frustratingly malleable standards that provide little guidance. See *id.* at 811–13 (explaining how decision-makers, including judges, sometimes avoid overly malleable standards to limit the number of options they must consider); see also Gentithes, *supra* note 218, at 32–34.

A manageability prerequisite will force parties to suggest rigid rules in constitutional cases to ensure that lower courts can easily implement the given legal test. Manageability requires rigid rules even if a more malleable standard could offer the flexibility needed to adjust for changes in thinking or facts.²²⁵ In contrast, workability review allows the Court to adopt either a rigid rule or malleable standard when entering a new substantive legal area, then review either approach and pivot if necessary. In some cases, it is better to try a (perhaps unmanageable) standard rather “than deny[] relief altogether.”²²⁶ This may be especially so where the Court’s holding is particularly controversial or novel. Allowing lower courts to experiment in flexible ways may provide needed information on the best legal tests to apply.²²⁷ In those situations, workability review operates like a thermostat for flexibility of legal tests; courts can turn the dial towards more or less malleability after observing the results of their initial efforts to define the test.

If the Supreme Court initially announces a relatively flexible standard, but later decides, based upon lower courts’ experiences, that greater guidance is needed, they can “rulify” that standard over time, providing guidance with more curbs on discretion for future application.²²⁸ Rather than refusing to adjudicate an important issue, the Supreme Court can adopt a “permissive standard” that allows lower courts “to fill in the relevant gaps with bright-line boundaries,” then correct the course of those lower courts as needed when experience demonstrates the need for firmer rules.²²⁹ Announcing such a permis-

²²⁵ As Richard Hasen has argued in the context of election cases under the Equal Protection Clause, “when the Court does not articulate a manageable standard, it leaves room for future Court majorities to deviate from or modify a ruling in light of new thinking about the meaning of democracy or the structure of representative government, or based on experience with the existing standard.” Richard L. Hasen, *The Benefits of “Judicially UnManageable” Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1470 (2002).

²²⁶ *Id.* at 1474–75.

²²⁷ *Id.* at 1489.

²²⁸ “Rulification occurs when courts applying a standard promulgate sub-rules to address particular situations. The overarching standard remains, but eventually a large proportion of cases is governed by rules.” Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 651 (2018); see also Schauer, *supra* note 224, at 806 (“[I]nterpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree, surprising . . . because the effect of such action is to constrain the very choices that those interpreters and enforcers would otherwise have had . . . thus in part . . . falsify[ing] the belief . . . that enforcers and interpreters relish [greater] choice”); Elkin-Koren & Fischman-Afori, *supra* note 222, at 163 (“Judges soften rules through interpretation and, in a similar fashion, rulify standards by elaborating discrete categories and developing contextual guidelines.”). This process occurs naturally as judges decide cases that provide specific examples of a standard’s application. Coenen, *supra* note 223, at 653.

²²⁹ Coenen, *supra* note 223, at 648. Alternatively, high courts might adopt a “mandatory standard” that “restrict[s] the extent to which lower courts may experiment with doctrine,” using “a rule against rulification.” *Id.* at 651; see also Elkin-Koren & Fischman-Afori, *supra* note 222, at 170. Scholar Michael Coenen also noted that high courts can announce “pro-rulification rules” that actively

sive standard may be particularly attractive where new cases are likely to arise under significantly uncertain conditions; they allow for lower court experimentation, reduce decisional costs, and create more predictability and certainty over time.²³⁰ And the Court can always retain the discretion to find that no lower court's experiment has satisfactorily resolved the issue, and thus it must be left to the political process rather than the courts.²³¹

Unmanageable legal tests do have drawbacks. They increase discretion among lower court decision-makers, which increases both the difficulty for those decision-makers and the likelihood that their decisions will deviate from majority preferences of the Supreme Court.²³² Unmanageable legal tests may ultimately fail, leading the Court to reverse the decisions that implemented them. But they are sometimes worth the risks. Fluid, even unmanageable tests can generate lower court experimentation in potentially important areas of jurisprudence that would otherwise go unaddressed if a firm manageability prerequisite were to take hold. Not all unmanageability is undesirable.

IV. A MANAGEABLE STANDARD FOR STANDARDS

Despite the convincing arguments against a manageability prerequisite outlined above, manageability may nonetheless take hold in the federal courts. This Part considers how courts should implement that prerequisite if it is unavoidable. Section A of this Part reviews the history of inconsistent definitions of manageability in the Supreme Court's gerrymandering jurisprudence.²³³ Section B examines the history of inconsistent definitions of manageability among the lower

encourage lower courts to experiment with more detailed rules to guide the application of otherwise fuzzy standards. Coenen, *supra* note 223, at 651.

²³⁰ Coenen, *supra* note 223, at 687 ("Rather than specify what an operative norm does and does not permit, the enactor of a legal standard leaves such matters for lower-ranking actors to decide—via the repeated resolution of cases arising under the standard's open-ended terms."); Hasen, *supra* note 225, at 1503 (comparing lower courts to "scouts" who might experiment with "different paths" out of a controversy, using unmanageable legal tests, while the Supreme Court gathers information from those scouting courts and ultimately chooses its preferred path).

²³¹ This process may have already occurred in the Supreme Court's recent extreme partisan gerrymandering litigation. The Court suggested decades earlier that a partisan gerrymander may be a justiciable violation of the Equal Protection Clause, though it did not announce a clear, manageable test to determine when such an unconstitutional gerrymander occurred. *Davis v. Bandemer*, 478 U.S. 109, 125–28 (1986), *abrogated by* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Lower courts then struggled to develop such a test, rejecting partisan gerrymandering claims. *See* Hasen, *supra* note 225, at 1502. Ultimately, the Court rejected all efforts to create such a test, instead determining, contrary to *Bandemer*, that these were nonjusticiable political questions the Court could not resolve. *Rucho*, 139 S. Ct. at 2491, 2508.

²³² Hasen, *supra* note 225, at 1489 ("[U]nmanageability imposes greater administrative costs, increased straying by the lower courts from Supreme Court majority preference, and a decreased ability of political actors to rely upon Supreme Court precedent.").

²³³ *See infra* notes 236–248 and accompanying text.

courts.²³⁴ Section C then suggests how courts might craft an acceptable definition of manageability if the prerequisite continues to grow in prominence.²³⁵

A. Mistaken Manageability in Partisan Gerrymandering Jurisprudence

Manageability already has a checkered history in Supreme Court jurisprudence. When it rose to prominence in partisan gerrymandering cases, the definition of manageability varied widely and shifted over time, making it an impossible hurdle for litigants to clear. At first, the Court demanded more precision, only to later vacillate between rejecting mathematical formulas and malleable standards in turn.

As early as 2004, in *Vieth v. Jubelirer*, a majority of the Court expressed dissatisfaction with the indeterminacy of a variety of proposed tests to measure the extremity of a partisan gerrymander.²³⁶ The Court critiqued tests based upon whether a political group was “denied its chance to effectively influence the political process,”²³⁷ finding them so indeterminate that they created a “legacy . . . of puzzlement and consternation” in the lower courts.²³⁸ Furthermore, according to the majority, tests that required showing both significant partisan effects and proof that “mapmakers acted with a *predominant intent* to achieve partisan advantage” would “cast[] [judges] forth upon a sea of imponderables, and ask[] them to make determinations that not even elections experts can agree upon.”²³⁹

Despite its critique of indeterminacy in *Vieth*, the Court, in *Gill v. Whitford*, in 2018, rejected a far more precise standard to measure partisan gerrymandering.²⁴⁰ In that case, the plaintiff relied on a measure known as the efficiency gap, a simple mathematical formula that generates a precise percentage to measure the extremity of gerrymandering.²⁴¹ But Chief Justice Roberts

²³⁴ See *infra* notes 249–263 and accompanying text.

²³⁵ See *infra* notes 264–266 and accompanying text.

²³⁶ 541 U.S. 267, 282–84 (2004).

²³⁷ *Davis v. Bandemer*, 478 U.S. 109, 132–33 (1986), *abrogated by* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

²³⁸ *Vieth*, 541 U.S. at 282.

²³⁹ *Id.* at 284, 290 (quoting Brief for Appellants at 19, *Vieth*, 541 U.S. 267 (No. 02-1580)).

²⁴⁰ 138 S. Ct. 1916, 1923–24, 1933 (2018).

²⁴¹ The efficiency gap, as stated in *Gill*:

[I]s calculated by subtracting the statewide sum of one party’s wasted votes from the statewide sum of the other party’s wasted votes and dividing the result by the statewide sum of all votes cast, where “wasted votes” are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory.

Id. at 1933; see also Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 851–52 (2015) (discussing the concepts of wasted votes

claimed that “the intelligent man on the street” would find such a mathematical formula insufficiently tethered to the Constitution’s text, and his fellow Justices agreed.²⁴² The Court asked the designers of a standard measuring extreme partisan gerrymandering to thread a needle between indeterminacy and precision.

Seemingly ignoring the critique of precise numerical formulas it made just a year earlier in *Gill*, the Court found more malleable standards too vague in 2019, in *Rucho v. Common Cause*.²⁴³ The Court first critiqued the plaintiffs’ proposed three-part Equal Protection standard that examined the predominant purpose of the mapmaker, the likelihood that partisan effects would be enduring, and whether the mapmaker could provide “a legitimate state interest or other neutral explanation” for its map.²⁴⁴ According to the Court, the first step of that analysis wrongly suggested that partisan intent was always impermissible.²⁴⁵ The Court further found the second step to be too vague, requiring courts to make impossible predictions about the durability of a gerrymander.²⁴⁶ And the third step was too broad, seeming to overlap with the first.²⁴⁷

In *Gill*, the Court suggested that numerically precise tests like the efficiency gap are not the kind of “manageable” standards the political question doctrine requires. Yet in *Rucho*, the Court lambasted the proposed standards as far too vague to pass constitutional muster, even complaining about the lack of a numerical test for the extremity of partisan gerrymandering.²⁴⁸ Such alternating critiques effectively reject all proposed standards, whether vague or precise.

B. Inconsistent Standards for Manageability in Lower Courts

Though many federal courts have deployed a manageability prerequisite in recent years, the contours of that prerequisite have varied widely from judge to judge.

and the efficiency gap). “Though they take no firm position on the matter, the plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny.” *Gill*, 138 S. Ct. at 1933.

²⁴² Transcript of Oral Argument at 37, 42–43, 50–54, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

²⁴³ 139 S. Ct. 2484, 2502 (2019).

²⁴⁴ *Id.* (quoting *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 868 (M.D.N.C. 2018), *vacated by Rucho*, 139 S. Ct. 2484).

²⁴⁵ *Id.* at 2502–03.

²⁴⁶ *Id.* at 2503–04.

²⁴⁷ *Id.* at 2504. The Court was similarly critical of the plaintiffs’ three-part First Amendment standard, which required proof of the mapmakers’ intent to burden the opposing party, “an actual burden on political speech or associational rights[,] and a causal link between the . . . intent and [the effects].” *Id.* According to the Court, that test also misleadingly suggested that any partisan intent in mapmaking is too much. *Id.* Furthermore, the proof of an actual burden upon First Amendment rights was “not a serious standard for separating constitutional from unconstitutional partisan gerrymandering[,]” but was instead a vague suggestion of how much gerrymandering is too much. *Id.*

²⁴⁸ *Id.* at 2501–02.

In *Juliana v. United States*, in 2020, the Ninth Circuit quoted extensively from *Rucho* to note that the Supreme Court sought a “‘limited and precise’ standard discernible in the Constitution” that is mathematically easy for courts to administer.²⁴⁹ The court then rejected a standard that would require the government to ensure atmospheric carbon levels of three hundred fifty parts per million, noting that simply ordering the government to develop a plan to reach those goals would then require courts “to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs’ right to a climate system capable of sustaining human life.”²⁵⁰ Such supervision could not be achieved by an Article III court, according to the Ninth Circuit.²⁵¹

Compare that definition of manageability to the Eleventh Circuit’s proposal in *Jacobson v. Florida Secretary of State*, which applied *Rucho*’s manageability framework to a challenge to a law that controlled the order in which candidates appear on Florida’s general election ballots.²⁵² Relying on *Rucho*’s language, the *Jacobson* court insisted that justiciable cases must present “‘limited and precise standards that are clear, manageable, and politically neutral.’”²⁵³ The court then noted that, absent sufficiently clear constitutional guidance, it could not define a “‘fair” ballot-ordering statute without making an “‘unmoored determination.””²⁵⁴ The Eleventh Circuit then claimed that sister circuits’ efforts to define a standard of fairness were contradictory, showing that no manageable standard existed.²⁵⁵ The critique was not that the tests that other circuits had devised were unadministrable; instead, the *Jacobson* court suggested that because so many different legal tests had been applied across circuits, no single manageable standard could exist.²⁵⁶ Thus, although the Supreme Court in *Juliana* focused on the difficulty in administering a mathematically precise legal test, the Eleventh Circuit in *Jacobson* complained about the difficulty in *choosing* from a variety of possible, and seemingly administrable, tests.²⁵⁷

Yet in a similar challenge to a ballot-ordering statute just two years later, the Ninth Circuit found the matter justiciable. As discussed above, in 2022, in

²⁴⁹ 947 F.3d 1159, 1173 (9th Cir. 2020) (quoting *Rucho*, 139 S. Ct. at 2500–01).

²⁵⁰ *Id.* (internal quotations omitted).

²⁵¹ *Id.*

²⁵² 974 F.3d 1236, 1241–42 (11th Cir. 2020).

²⁵³ *Id.* at 1263 (quoting *Rucho*, 139 S. Ct. at 2500).

²⁵⁴ *Id.* (internal quotations omitted).

²⁵⁵ *Id.* at 1266–67 (first citing *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016); then citing *McLain v. Meier*, 637 F.2d 1159, 1169 (8th Cir. 1980); and then citing *Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir. 1977)) (collecting cases that used various legal tests applied to ballot-ordering statutes).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

Mecinas v. Hobbs, the Ninth Circuit held that adjudicating ballot-ordering statutes simply required ordering based on some factor other than political party affiliation.²⁵⁸ Courts can simply balance the character and magnitude of the plaintiff's asserted injury with the state's purported interests in the ballot-ordering statute—a test that “provides precisely the sort of judicially manageable standard that renders a case . . . amenable to adjudication.”²⁵⁹ Thus, where the Eleventh Circuit found no manageable tests, the Ninth Circuit found several—all just three years after the Ninth Circuit itself found no such manageable tests in climate change litigation.

Confusion within the Ninth Circuit—and among its constituent courts—over the meaning of manageability does not end there. In *National Urban League v. Ross*, although the court reached the merits of the decision, dissenting Judge Bumatay argued that a challenge to the Census Bureau's plan to advance deadlines for the 2020 census was not justiciable because it was not “amenable to ‘judicially discoverable and manageable standards.’”²⁶⁰ Judge Bumatay cited to *Rucho*'s holding that extreme partisan gerrymandering is a nonjusticiable political question, then added that “determining the ‘accuracy’ of the census is no more of a judicial question than determining the ‘fairness’ of districting maps.”²⁶¹ Without defining what a manageable test might be, Judge Bumatay insisted that the judiciary is not “equipped” to make that accuracy determination.²⁶² Yet when the Ninth Circuit remanded the case for resolution of the defendants' motion to dismiss, the district court asserted that no decision had applied the political question doctrine to such a census controversy before, and that the Census Act provided a discoverable and manageable standard to review the Census Bureau's plan in this instance.²⁶³

These varying approaches to manageability demonstrate the problem, even within a single circuit, with defining a manageability prerequisite for legal tests. The manageability prerequisite generates wide judicial discretion to determine how much flexibility and indeterminacy is permissible in a legal test. Sometimes, numerically precise goals with little guidance on how to reach them are too unmanageable. At other times, the very fact that different courts have adopted varying approaches to a legal problem demonstrates that no manageable test exists, even as other courts suggest that any one of those approaches presents a manageable option. And in still more cases, judges simply

²⁵⁸ 30 F.4th 890, 902 (9th Cir. 2022).

²⁵⁹ *Id.*

²⁶⁰ 977 F.3d 698, 708 (9th Cir. 2020) (Bumatay, J., dissenting) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

²⁶¹ *Id.* at 708–09.

²⁶² *Id.* at 710.

²⁶³ *Nat'l Urb. League v. Ross*, 508 F. Supp. 3d 663, 686–87 (N.D. Cal. 2020).

assert that no manageable test exists because the issue seems too overtly political, no matter how precisely the litigants might define the problem. To date, the manageability prerequisite has proven to be an unmanageable standard for lower courts to define and apply with any consistency.

C. Crafting a Manageable Definition of Manageability

If the manageability prerequisite continues to grow in federal courts, judges who implement it should craft a clear definition that provides a relatively low hurdle for litigants to cross. The history of extreme partisan gerrymandering in the Supreme Court provides a cautionary tale. The Court rejected numerically precise tests only to later criticize looser proposed standards as far too vague. The whiplash this generated among litigants had real costs. If the Court applied a consistent standard to measure the manageability partisan gerrymandering test, it might have opened the door to human ingenuity, allowing that to resolve the very manageability concern that the Court claims plaintiffs have failed to sufficiently address. Given the vital importance of this issue to the future of our nation, the Court should have accepted something less than perfection in terms of standards. Furthermore, it should have suggested that litigants and judges experiment with stricter standards in cases that will arise below, incentivizing those opposed to extreme partisan gerrymandering to unleash their capabilities against one of the most destructive forces in our democracy.²⁶⁴

This history suggests that any manageability requirement should not be overly exacting, alternately finding plausible tests both too imprecise and too inflexible. Instead, the Court must strive for clarity in its “standard for standards,” setting a relatively low threshold that will make the manageability prerequisite itself manageable.

That manageability prerequisite should also be consistent across issues, whether those concern structural aspects of our government or individual rights. If the manageability prerequisite continues to extend to matters of individual rights, courts must avert applying inconsistent and increasingly difficult

²⁶⁴ Justice Stevens’s view in *Vieth v. Jubelirer* is particularly informative on this point:

Quite obviously, however, several standards for identifying impermissible partisan influence are available to judges who have the will to enforce them. We could hold that every district boundary must have a neutral justification; we could apply Justice Powell’s three-factor approach in *Bandemer*; we could apply the predominant motivation standard fashioned by the Court in its racial gerrymandering cases; or we could endorse either of the approaches advocated today by Justice SOUTER and Justice BREYER. What is clear is that it is not the unavailability of judicially manageable standards that drives today’s decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.

541 U.S. 267, 341 (2004) (Stevens, J., dissenting).

definitions of manageability for litigants to meet. Courts should not dilute protections for the individual rights of disfavored minorities under the guise of justiciability. Instead, courts need a clear, consistent, and achievable prerequisite for cases involving individual rights.

Importantly, that manageability prerequisite must appeal to all judges no matter what interpretive method they might apply to constitutional issues. As scholar Randy Kozel has argued, doctrines that aim to restrain judicial discretion, such as *stare decisis*, will be effective only if Justices across the spectrum of interpretive methods can agree upon the doctrine's content.²⁶⁵ Justices should not generate a manageability prerequisite that relies on the substance of interpretive methods—for instance, one that finds tests based upon historical sources relied upon by originalists always manageable, while finding those crafted from a living constitutional perspective always unmanageable. Because it is easy for judges to disagree with decisions crafted from an alternative methodology,²⁶⁶ it would be easy for a one-sided version of the manageability prerequisite to become a new front in the interpretive methodology battle, all while undermining the ability of federal courts to adjudicate constitutional issues.

Judges do not agree about interpretive methodologies, and they will similarly not agree about a definition of manageability based upon those methodologies. To be a tolerable addition to constitutional jurisprudence, the manageability prerequisite must at least avoid the tit-for-tat quagmire of opposing interpretive methodologies critiquing opposed manageability rulings. If each judge applies their own understanding of what is manageable with a favorable opinion of rulings that rely upon their own interpretive methodologies, then the manageability prerequisite will not constrain judicial discretion whatsoever. Instead, it will generate vast discretion and increase the acrimony on the federal bench while reducing the avenues to constitutional relief for litigants.

CONCLUSION

Whether motivated by a genuine affinity for judicial minimalism or a veiled policy preference for the status quo, judges have a variety of doctrines to sidestep challenging constitutional questions. As this Article has demon-

²⁶⁵ KOZEL, *supra* note 21, at 61; *see also* Gentithes, *supra* note 2, at 116 (“If *stare decisis* does anything, it at least occasionally constrains Justices from overturning a case with which they disagree. To perform even that minimal function, it must appeal to some objective criteria beyond individual Justices’ interpretive methodologies, and those criteria must be ones upon which the Justices can agree.” (citing KOZEL, *supra* note 21, at 103)).

²⁶⁶ Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 113 (1991) (“[I]t is not hard for intelligent Justices (particularly if they share strong views about how the Constitution should be interpreted) to find some fault with a constitutional precedent . . .”).

strated, there is a new arrow in the “minimalist” judge’s quiver: a manageability prerequisite. The prerequisite that is analytically distinct from traditional sidestepping doctrines like standing and political questions has spread throughout the federal judiciary and threatens to undermine its ability to resolve pressing constitutional issues.

It is not too late to change the trajectory of the manageability prerequisite. As this Article’s normative analysis demonstrates, manageability replicates workability review, though it is even more amorphous, given the dearth of information about the effectiveness of a legal test when manageability is deployed. Federal courts should not adopt manageability, even if in exchange they must permit more frequent reversals after workability review. This will allow those courts to capitalize on the utility of the occasional unmanageable legal test, especially in cases involving novel issues of pressing importance to the nation. And if manageability does take hold, courts can limit the damage by crafting a clear standard for manageable tests that provides a relatively low hurdle for litigants to cross.

