



ARTICLE

The Real Political Question Doctrine

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Abstract. There have long been debates about the nature, scope, and legitimacy of the political question doctrine, the modern version of which originates with the Supreme Court's 1962 decision in *Baker v. Carr*. Despite the differing views, the scholarly commentary has one thing in common: It is focused almost entirely on the Supreme Court. In the sixty years since *Baker*, however, the Court has applied the doctrine as a basis for dismissal in only three majority decisions. By contrast, during this period, the lower courts have applied the doctrine as a basis for dismissal in hundreds of cases. We provide the first empirical account of how the doctrine has operated in the lower courts since *Baker*. Our account is based on both a quantitative and qualitative analysis of a sample of these decisions. This account reveals a political question doctrine that is substantially different from the one described in most scholarship: It is more vibrant, heavily focused on foreign affairs, often applied in nonconstitutional cases, more prudential, and not a permanent disallowance of judicial review. The lower courts use the doctrine to evaluate their own institutional capacity to resolve politically sensitive disputes. It is the lower courts' more limited capacity compared to that of the Supreme Court, combined with their non-discretionary docket, that explains the lower courts' heavier reliance on the doctrine.

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Table of Contents

Introduction 1033

I. Background..... 1035

 A. The Political Question Doctrine in the Supreme Court 1036

 B. Scholarly Commentary 1040

 C. Common Assumptions in the Literature 1047

II. Empirics..... 1049

 A. A Quantitative Assessment 1049

 B. A Qualitative Assessment of the Foreign Affairs Cases..... 1056

 1. Treating nonjudicial determinations as conclusive..... 1056

 2. Refusing to direct certain exercises of governmental discretion 1058

 3. Abstention from deciding certain separation-of-powers disputes 1058

 4. Claims concerning actions of the U.S. government abroad..... 1060

 5. Claims concerning actions by private companies abroad 1063

 6. The rights and liabilities of foreign nations..... 1064

III. Theory 1068

 A. Observations from Lower Court Practice 1068

 B. The Political Question Doctrine and Judicial Capacity 1075

 1. Three steps 1076

 2. Similar doctrines..... 1079

 3. Foreign affairs 1082

 C. Disparity Between the Supreme Court and the Lower Courts..... 1084

Conclusion..... 1089

Introduction

Under the political question doctrine, some issues are deemed to be inappropriate for judicial resolution. The Supreme Court adverted to this possibility in *Marbury v. Madison*, when it observed that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”¹ The modern version of the doctrine is typically traced to the Supreme Court’s 1962 decision in *Baker v. Carr*, in which the Court listed six reasons why a question might be deemed to be political.²

There have long been debates about the nature, scope, and legitimacy of the political question doctrine.³ Some scholars contend that the doctrine is entirely illegitimate—an abdication of the judicial duty to apply the law. Others believe, in what is sometimes called the “classical” view, that application of the doctrine is appropriate only when the Constitution itself requires the courts to accept a nonjudicial determination, either completely or within a band of discretion. Under a broader “functional” view of the doctrine, judicial abstention is also appropriate when the courts lack sufficient information or expertise to make a reasoned legal decision—or at least a decision that is likely to be any better than the one made by the political branches. Finally, under the broadest “prudential” view, the doctrine is also a means by which courts can manage their resources, protect their political capital, and abstain when providing a judicial answer might do more harm than good. Regardless of which view of the doctrine is advocated, commentators often observe that the contours of and justifications for the doctrine are murky and confused.⁴

1. 5 U.S. (1 Cranch) 137, 170 (1803).

2. 369 U.S. 186, 217 (1962). *See, e.g.*, ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.6.1, at 166 (8th ed. 2021) (“The classic, oft-quoted statement of the political question doctrine was provided in *Baker v. Carr*.”); Scott Dodson, *Article III and the Political Question Doctrine*, 116 N.W. U. L. REV. 681, 682 (2021) (“Though the doctrine has historical roots, the modern incarnation of the political question doctrine was cast by *Baker v. Carr* . . .”).

3. *See infra* Part I.B.

4. For recent observations to this effect, see, for example, CHERMERINSKY, note 2 above, § 2.6.1, at 164 (“In many ways, the political question doctrine is the most confusing of the justiciability doctrines.”); Dodson, note 2 above, at 687 (“It is fair to say that the political question doctrine is ill-defined, unsettled, and contentious.”); and Richard H. Fallon Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1482 (2020) (“Although such a doctrine indisputably exists, debate abounds concerning its nature and foundations.”). These observations are longstanding. *See, e.g.*, John P. Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (Edmond Cahn ed., 1954) (“The origin, scope, and purpose of the concept have eluded all attempts at precise statement.”). Courts, too, have commented on the uncertain nature of the doctrine. *See, e.g.*, *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008) (quoting Judge Bork’s observation in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring), that “the contours of the doctrine are murky and unsettled,” and noting that this “observation remains true today”).

Despite the differing views reflected in these accounts, the scholarly commentary has one thing in common: It is focused almost entirely on the Supreme Court.⁵ The Court, however, rarely applies the doctrine: In the sixty years since *Baker*, it has applied the doctrine as a basis for dismissal in only three majority decisions.⁶ By contrast, the doctrine is a recurring feature of lower court practice. Most scholars discussing the doctrine say nothing about this lower court practice, make only a passing reference to it, or evaluate only a handful of cases in particular contexts.

In this Article, we provide the first empirical account of how the doctrine has operated in the lower courts since *Baker*. Our account is based on both a quantitative and qualitative analysis of the cases and is primarily descriptive rather than normative. What we find is a political question doctrine that is substantially different from the one described in the scholarship in five respects.

First, the doctrine is more vibrant than is commonly assumed. The lower courts apply it regularly, even after the Supreme Court has signaled a lack of enthusiasm for it. Second, the application of the doctrine is concentrated in the foreign affairs area, a finding that has been suggested by some commentators⁷ but that until now has not been documented through a close study of lower court practice. Third, even though the academic literature on the political question doctrine is almost entirely focused on constitutional adjudication, lower courts often apply the doctrine in nonconstitutional cases—that is, cases involving claims brought under federal statutes, state law, or international law. Fourth, the doctrine as applied in the lower courts is more prudential in its orientation than one would expect just by reading the post-*Baker* Supreme Court decisions.

Finally, our empirical study reveals a fundamental feature of the doctrine that has been missed in the literature. Contrary to what has been assumed (and which is a key part of the “judicial abdication” critique), we show that the political question doctrine does not typically have the effect of permanently disallowing adjudication of an issue. Instead, declarations by the courts that an issue is political simply mean that the courts will not exercise their own judgment until the legal materials become clearer, something that can typically be accomplished by Congress through statute. This is obviously true in nonconstitutional cases, in which Congress can simply legislate a clear rule of decision, but it is true in most constitutional cases as well. This conclusion

5. See *infra* text accompanying notes 86-87.

6. See *infra* Part I.A. The three cases are *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Nixon v. United States*, 506 U.S. 224 (1993); and *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

7. See, e.g., Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 16 (2017); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1403 (1999).

strengthens the argument for the doctrine's legitimacy and sheds light on doctrinal debates about the relationship of the doctrine to Article III of the Constitution and to the state courts.

After setting forth this empirical account, we offer a theory of the political question doctrine's functions. The doctrine is relevant, we argue, in settings in which a court faces a dispute for which there is no clear source of law and questions arise as to whether a court is the proper institution for resolving the dispute. In these situations, the political question doctrine, like a variety of other doctrines, is a way for courts to determine whether they have the capacity to resolve the dispute. Capacity refers both to issues of competence—such as a court's ability to gather facts, interpret the law, and predict the consequences of its decisions—and to the court's political standing or legitimacy. Courts frequently presume that they have this capacity, so express reference to this question is often omitted.

This theory explains why the political question doctrine is more vibrant in the lower courts than in the Supreme Court. The Supreme Court has much more discretion over its docket than the lower courts do over theirs. It also has more authority than the lower courts, both as a constitutional and a practical matter. As application of the political question doctrine typically avoids a confrontation with the executive branch (and sometimes Congress), the lower courts have greater need for it than does the Supreme Court. Despite its general pronouncements about the doctrine, the Supreme Court accepts that the lower courts should decide for themselves whether they have the capacity to decide a dispute. This creates a somewhat anomalous situation. Normally, the lower courts are supposed to decide cases in a manner consistent with Supreme Court precedent. But an equilibrium has arisen, apparently based on a tacit understanding, in which the lower courts apply the political question doctrine in cases that the Supreme Court would likely decide on the merits. The Supreme Court then maintains this equilibrium by denying certiorari rather than taking cases and reversing the lower courts. Because commentators have focused on the Supreme Court's decisions on the merits, they have overlooked this phenomenon.

Part I of this Article describes the Supreme Court's application of the doctrine, as well as the longstanding academic debates that the doctrine has generated. Part II provides an empirical account of the doctrine. Part III offers a theory of the functions that the doctrine serves and an account of why the doctrine is more robust in the lower courts than in the Supreme Court. Part IV concludes.

I. Background

This Part provides the background for the empirical analysis that will follow. It describes the Supreme Court's treatment of the political question

doctrine, and it points out some questionable assumptions in the literature that stem from the literature's almost-exclusive focus on the Court.

A. The Political Question Doctrine in the Supreme Court

Throughout the nineteenth and early twentieth centuries, the Supreme Court declared a variety of issues to be political and thus inappropriate for judicial resolution. Many of these issues related to foreign affairs, concerning matters such as the application of treaties, the extent of the United States' and other countries' sovereign territory, and whether to recognize particular foreign governments.⁸

In domestic affairs, the Court's most noteworthy nineteenth-century decision declaring an issue to be political was *Luther v. Borden*, in which the Court declined to adjudicate whether Rhode Island's charter form of government violated the Guarantee Clause of the Constitution.⁹ The Court explained that, under the clause, "it rests with Congress to decide what government is the established one in a State" and that "[Congress's] decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."¹⁰ Many years later, in *Pacific States Telephone & Telegraph Co. v. Oregon*, the Court stated more categorically that whether a state government violates the Guarantee Clause "has long since been

8. See Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 453-54 (1956); see also, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (noting that questions concerning "the rights of a part of a foreign empire, which asserts, and is contending for its independence . . . are generally rather political than legal in their character"); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 309 (1829) ("A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question . . ."); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 602 (1889) ("The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."); *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) ("[W]hether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not to interfere with the conclusions of the political department in that regard."); *Charlton v. Kelly*, 229 U.S. 447, 474-76 (1913) (applying a treaty, despite an alleged breach by the other party, because "the political branch of the Government recognizes the treaty obligation as still existing").

9. 48 U.S. (7 How.) 1, 35, 42 (1849). The Guarantee Clause states: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

10. *Luther*, 48 U.S. at 42.

determined by this court . . . to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.”¹¹

In *Coleman v. Miller*, the Supreme Court concluded that the validity of Kansas’s ratification of a proposed child labor amendment to the U.S. Constitution was a political question, emphasizing the lack of specific constitutional or statutory materials that a court could use to resolve the case.¹² Reflecting more generally on the nature of political questions, the Court said that “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.”¹³ In support of this observation, the Court cited to both its foreign affairs and Guarantee Clause decisions.

The modern political question doctrine is often traced to the Supreme Court’s 1962 decision in *Baker v. Carr*.¹⁴ In concluding that an equal protection challenge to the apportionment of state representatives in Tennessee was justiciable, the Court reviewed its prior political question decisions, seeking to “infer from them the analytical threads that make up the political question doctrine.”¹⁵ The Court observed that the application of the doctrine in those decisions was based on one or more of the following six factors:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁶

The Court said that “[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the

11. 223 U.S. 118, 133 (1912); *see also* *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion) (“Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.”).

12. 307 U.S. 433, 450-54 (1939). The Court was also evenly divided over whether another issue in the case—whether it was appropriate for Kansas’s lieutenant governor to have broken a tie in the Kansas senate—was a political question. *See id.* at 446-47.

13. *Id.* at 454-55.

14. 369 U.S. 186 (1962); *see supra* note 2.

15. *Baker*, 369 U.S. at 187-88, 211.

16. *Id.* at 217 (bracketed numbers added).

ground of a political question's presence.¹⁷ The last three factors are often described as prudential in nature.¹⁸ In fact, all of the factors, even the first one, have a prudential element. The second and third factors involve judgment calls about the relative competence of the judiciary to decide a question and, relatedly, the risks associated with judicial resolution. As for the first factor, the Constitution almost never clearly disallows judicial review of an issue; the determination that it does is an interpretive question likely to be affected by prudential assessments.¹⁹

Since *Baker*, the Supreme Court has applied the doctrine in only three decisions—in 1973, 1993, and 2019.²⁰ In *Gilligan v. Morgan*, a case brought in the wake of the Kent State shootings by the National Guard in Ohio, the Court held that a suit brought under the Due Process Clause of the Fourteenth Amendment, seeking injunctive and declaratory relief relating to how the National Guard was trained and used, raised political questions.²¹ The Court reasoned:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.²²

The Court reached this conclusion even though courts commonly adjudicate claims under the Fourteenth Amendment's Due Process Clause in other contexts.²³

In the second of these decisions, *Nixon v. United States*, the Court held that a challenge to the Senate's use of a committee to receive evidence during an

17. *Id.*

18. *See, e.g.*, PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 143 (7th ed. 2018).

19. For additional discussion of this point, see text accompanying notes 191-93 below.

20. Four-Justice pluralities on the Court also invoked the doctrine in *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (concerning partisan gerrymandering) and *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist J., concurring in the judgment) (concerning presidential termination of a treaty).

21. 413 U.S. 1, 3, 6, 8-9 (1973).

22. *Id.* at 10.

23. Courts commonly consider both procedural and substantive claims under the Due Process Clause. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005) (procedural); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (substantive).

impeachment trial raised a political question.²⁴ Although the challenger there alleged that the Senate's use of a committee was inconsistent with the specification in the Constitution that the Senate "try" all impeachments, the Court concluded that the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."²⁵ The Court also reasoned that judicial review of this issue would be inconsistent with the Constitution's assignment to the Senate of the "sole" power to try impeachments.²⁶ The Court emphasized the need for finality in the impeachment context and the difficulty of fashioning judicial relief.²⁷

Finally, in *Rucho v. Common Cause*, the Court held that a constitutional challenge to partisan gerrymandering raised a political question.²⁸ The Court emphasized the difficulty of formulating a "clear, manageable, and politically neutral" test for determining when gerrymandering is illegal.²⁹ This was a situation, said the Court, in which "the Constitution provides no basis whatever to guide the exercise of judicial discretion."³⁰ The Court also expressed concern about being pulled into recurring, and highly partisan, districting disputes:

[These disputes] would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.³¹

The Court concluded by observing that both the states and Congress have tools for addressing excessive partisan gerrymandering.³²

Meanwhile, the Court has adjudicated some high-profile disputes that might have seemed ripe for political question analysis while ignoring or discounting the doctrine. Three examples are especially noteworthy. First, in its 2000 decision in *Bush v. Gore*, the Court adjudicated a challenge to Florida's recount of votes in a presidential election, without even mentioning the

24. 506 U.S. 224, 226, 228-29, 238 (1993).

25. *Id.* at 230. The relevant constitutional clause provides: "The Senate shall have the sole Power to try all Impeachments." U.S. CONST. art. I, § 3, cl. 6.

26. *Nixon*, 506 U.S. at 231.

27. *Id.* at 236.

28. 139 S. Ct. 2484, 2506-07 (2019).

29. *Id.* at 2498 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 307-08 (2004) (Kennedy, J., concurring in the judgment)).

30. *Id.* at 2506.

31. *Id.* at 2507.

32. *Id.* at 2507-08.

political question doctrine.³³ Second, in its 2012 decision in *Zivotofsky v. Clinton*, the Court rejected the government's argument that a sensitive dispute relating to the executive branch's policies concerning the Middle East was a political question.³⁴ The majority in that decision discussed only the first two factors from *Baker*, describing the political question doctrine as a "narrow exception" to the judiciary's duty to decide cases properly before it.³⁵ Finally, during this period, the Court did not apply the political question in any of its "war on terror" decisions concerning the detention and trial of alleged combatants and suspected terrorists, despite the national security context of the cases.³⁶

During this period, the Supreme Court's appellate jurisdiction became almost entirely discretionary.³⁷ The number of cases that the Court hears each year also dropped substantially: From the 1960s through the 1980s, the Court heard more than 150 cases per year, but the numbers began declining by the late 1980s and the Court now hears only around 60 to 70 cases per year.³⁸ In light of these developments, some scholars have suggested that the Supreme Court has less need than the lower courts for the political question doctrine because it can use certiorari denials to avoid politically sensitive cases.³⁹

B. Scholarly Commentary

The political question doctrine has long been the subject of academic disagreement. In the 1920s, there was a noteworthy debate between Maurice Finkelstein and Melville Weston over the legitimacy and proper scope of the doctrine. Finkelstein advanced a discretionary and prudential account, arguing

33. 531 U.S. 98, 100-03 (2000). Justice Ginsburg briefly mentioned the doctrine in a footnote in her dissent. *See id.* at 142 n.2 (Ginsburg, J., dissenting).

34. 566 U.S. 189, 191-93 (2012).

35. *Id.* at 194-96.

36. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006); *Boumediene v. Bush*, 553 U.S. 723, 732, 765 (2008). For an argument that the exercise of authority to suspend the writ of habeas corpus should not be viewed as a political question, see generally Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006).

37. In the 1970s, Congress eliminated most of the provisions for three-judge district court decisions (which had an automatic right of appeal to the Supreme Court). *See Act of Aug. 12, 1976*, Pub. L. No. 94-381, 90 Stat. 1119 (codified at 28 U.S.C. § 2284); 28 U.S.C. § 1253. By 1988 it had eliminated most other vestiges of mandatory Supreme Court review. *See Act of June 27, 1988*, Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1257-58).

38. *See, e.g.*, Michael Heise, Martin T. Wells & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567-68 (2020); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228-29 (2012).

39. *See, e.g.*, Fallon, *supra* note 4, at 1487 & n.22.

that the label “political questions” “applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction.”⁴⁰ He elaborated that “[s]ometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail,” “[s]ometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved,” and “[s]ometimes it will be induced by the feeling that the matter is ‘too high’ for the courts.”⁴¹

Weston responded that a political question is simply a question that is “by law for the determination of the executive or legislative departments, or possibly of the people themselves.”⁴² Under this account, the line between legal and political questions is not a matter of judicial discretion but is instead “wholly a matter of the delegation of authority under organic law.”⁴³ Finkelstein then responded to Weston, arguing that “[a] realistic view of law must recognize” the discretion that the courts were actually exercising in these cases.⁴⁴

The most famous debate about the doctrine, which occurred during the late 1950s and early 1960s, was between Herbert Wechsler and Alexander Bickel. In many respects it was simply a more elaborate version of the Finkelstein-Weston debate. In the wake of *Brown v. Board of Education* and associated debates about the proper scope of judicial review, Wechsler argued (similar to Weston) that “all the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.”⁴⁵ According to Wechsler, this narrow approach, which is sometimes called the “classical” view of the doctrine,⁴⁶ followed from the fact that judicial review is “anchored in the Constitution” and therefore constitutes a “judicial obligation.”⁴⁷

40. Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344 (1924).

41. *Id.* at 344-45.

42. Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 299 (1925) (emphasis added).

43. *Id.* at 300.

44. Maurice Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 222 (1925).

45. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959). For his discussion of *Brown*, see *id.* at 31-35.

46. See, e.g., 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, 246, 247 n.24 (2002).

47. Wechsler, *supra* note 45, at 6.

In response, Bickel argued (similar to Finkelstein) for a broader and more discretionary conception of the doctrine, as part of a general account of what he called the “passive virtues.”⁴⁸ Bickel contended that:

[O]nly by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation. The political-question doctrine simply resists being domesticated in this fashion. There is something different about it, in kind, not in degree, from the general “interpretive process”; something greatly more flexible, something of prudence, not construction and not principle.⁴⁹

For Bickel, unlike Wechsler, judicial review was not so much a duty imposed by the Constitution as a power to be exercised by the Court in managing its resources, protecting its legitimacy, and preserving a separation of powers:

Such is the basis of the political-question doctrine: the [C]ourt’s sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won’t; finally and in sum (“in a mature democracy”), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.⁵⁰

Bickel’s conception of the doctrine is often described as a “prudential” approach.⁵¹

Gerald Gunther memorably described Bickel’s approach as “the 100% insistence on principle, 20% of the time.”⁵² Bickel saw the passive virtues as a way that the Court could maintain principled adjudication but, according to Gunther, the problem was that those virtues (including the political question doctrine) were themselves unprincipled.⁵³ Other scholars argued for a “functional” middle ground between Wechsler and Bickel that would include

48. See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42-46 (1961) [hereinafter Bickel, *The Passive Virtues*]. Bickel further developed these ideas in a book, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111, 118 (1962) [hereinafter BICKEL, *THE LEAST DANGEROUS BRANCH*].

49. Bickel, *The Passive Virtues*, *supra* note 48, at 46 (footnote omitted).

50. *Id.* at 75.

51. See, e.g., Barkow, *supra* note 46, at 261.

52. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

53. See *id.* at 9-10.

considerations of judicial capacity but would not be as discretionary as the prudential account.⁵⁴

Another round of debate about the political question doctrine occurred after *Baker*, especially once some lower courts applied the doctrine in the 1960s and early 1970s to bar consideration of the legality of the Vietnam War (and the Supreme Court repeatedly denied certiorari).⁵⁵ The most notable contribution to this debate was by Louis Henkin, who maintained that, at least historically, there was no genuine political question doctrine, at least not one “in which the courts forego their unique and paramount function of judicial review of constitutionality.”⁵⁶

Other commentators in this period thought that there was a political question doctrine, but they questioned its legitimacy, even in the narrow “classical” form suggested by Wechsler. Martin Redish contended that, “[o]nce we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations.”⁵⁷ Michael Glennon similarly argued that, “[i]n modern American society, these justifications for judicial abstention [under the political question doctrine] seem increasingly to be calls for judicial abdication” and are “bare attacks upon the idea of judicial review.”⁵⁸ And Rebecca Brown, commenting on the Supreme Court’s application of the political question doctrine in *Nixon v. United States*, described it as “a thorn in the side of separated powers.”⁵⁹

The Court’s decision in *Bush v. Gore* set off another round of reflection and debate concerning the political question doctrine, although this time some scholars were bemoaning what they saw as the demise of the doctrine. Writing in the wake of this decision, Rachel Barkow criticized the Court for its judicial supremacist orientation, explaining that a doctrine that enabled the Court to avoid sensitive political questions was “at odds with the Court’s view of its place in the constitutional order and of its superior competency vis-à-vis

54. See, in particular, Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566 (1966).

55. See, e.g., Louis Henkin, Editorial Comment, *Viet-Nam in the Courts of the United States: “Political Questions,”* 63 AM. J. INT’L L. 284, 284 (1969); Michael E. Tigar, *Judicial Power, the “Political Question Doctrine,” and Foreign Relations*, 17 UCLA L. REV. 1135, 1135-36 (1970).

56. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 599-601 (1976).

57. Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1059-60 (1985).

58. Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT’L L. 814, 815-16 (1989); see also MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 314-21 (1990) (criticizing the political question doctrine).

59. Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 127.

Congress and the Executive to decide *all* constitutional questions.”⁶⁰ Robert Pushaw similarly complained after *Bush v. Gore* that “the political question doctrine has ceased to function as a meaningful jurisdictional restraint” and argued that the *Baker* framework should be abandoned in favor of an approach whereby the general presumption in favor of judicial review could be “rebutted by certain constitutional provisions, interpreted in light of basic principles of constitutional structure and theory.”⁶¹

Mark Tushnet also commented on the purported demise of the political question doctrine. His view was that the doctrine is a prudential device, as argued by Bickel, but that the Court had undermined its ability to use it by specifying factors in *Baker* that must be considered when applying it. “In providing reasons for invoking the doctrine,” he said, “the Court creates a doctrine that inevitably undermines the possibility of deploying the political question doctrine in the service of prudent judgment, for it is precisely the characteristic of prudential judgment that *cannot* be captured in rules.”⁶² Somewhat relatedly, Louis Michael Seidman argued that “the effort to make the political question problem into a ‘doctrine’—to bound it by a rule of law—is a fool’s errand” because the Court “has never—and never can—develop constitutional rules that control the political judgments, as so understood, that it regularly makes.”⁶³

Subsequent scholarship attempted to define more specifically the types of situations in which the political question doctrine should or should not be applied. Like other scholars at this time, Jesse Choper observed that “the doctrine has rarely served as a meaningful restraint on the Supreme Court’s authority.”⁶⁴ He argued that the doctrine should be reformulated to turn “on questions of comparative institutional competence and the distinction between structural constitutional issues and individual rights.”⁶⁵ Harlan Cohen, writing later (and after *Zivotofsky*), advocated for a “politics-reinforcing” approach to the political question doctrine that “counsels abstention or forbearance specifically when the President and Congress are in disagreement.”⁶⁶

60. Barkow, *supra* note 46, at 242.

61. Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1167-68 (2002).

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

63. Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 442 (2004).

64. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1459 (2005). Choper nevertheless thought that “reports of the political question’s demise are premature.” *Id.*

65. *Id.* at 1460-61.

66. Cohen, *supra* note 7, at 6.

Formalist scholars have tended to be more skeptical of the modern political question doctrine and its pedigree. Tara Grove has argued that the modern political question doctrine did not emerge until *Baker* and that it has been “employed by the Supreme Court to entrench, rather than to undermine, its emerging supremacy over constitutional law.”⁶⁷ Traditionally, she contends, “political questions were not constitutional questions but instead were factual determinations made by the political branches that courts treated as conclusive in the course of deciding a case or controversy.”⁶⁸ Since *Baker*, however, she explains that the doctrine has been viewed as applicable to constitutional claims, and as creating a jurisdictional bar to adjudication.⁶⁹ Moreover, she contends that with the adoption of the *Baker* approach to the doctrine, the Court now “asserts for itself the power to decide who decides any constitutional question.”⁷⁰ Such a doctrine, she argues, “cannot be justified on the basis of a long historical pedigree.”⁷¹

Somewhat similarly, John Harrison has argued that, at least traditionally, the doctrine has had two branches.⁷² One is a rule of “non-judicial finality”—that is, “some political actor’s decision applying law to fact is accorded the finality that the courts’ judgments enjoy.”⁷³ The other is a limit on judicial remedies that “would intrude into political discretion,” such as with respect to military matters.⁷⁴ Understood in these terms, Harrison contended, the doctrine has a narrow scope.⁷⁵ He proceeded to criticize some lower courts for applying a broader version of the doctrine.⁷⁶

The Supreme Court’s recent application of the doctrine in *Rucho* has prompted additional reflection. Characteristic of some of his other work, Richard Fallon has offered a pluralistic account of the political question doctrine, maintaining that it “can and does combine elements modeled by the classical, functional, and prudential theories.”⁷⁷ He also has tied the doctrine and its limitations to concerns about ultra vires actions by the government, including ultra vires actions by the judiciary. As he explains, “[t]he political

67. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911, 1913 (2015).

68. *Id.* at 1916.

69. *See id.* at 1911-13.

70. *Id.* at 1914.

71. *Id.*

72. John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 460 (2017).

73. *Id.*

74. *Id.* at 460, 519.

75. *Id.* at 518-20.

76. *See id.* at 512-28.

77. Fallon, *supra* note 4, at 1519.

question doctrine marks some questions as ultra vires, or beyond the jurisdiction of courts to resolve,” but “[e]ven after denominating a question as political . . . courts typically retain a responsibility to check actions by other institutions that overreach the outer limits of those institutions’ authority.”⁷⁸ “As a result,” says Fallon, “denomination of a question as a political question marks a less categorical commitment to judicial nonintervention than many and perhaps most commentators have imagined.”⁷⁹

There is also an ongoing side debate about the relationship of the political question doctrine to both Article III of the Constitution and, relatedly, to state courts. Most justiciability doctrines, such as the doctrine of standing, have a core component that stems from Article III of the Constitution.⁸⁰ As a result, federal courts are constitutionally disempowered from hearing cases that do not satisfy this component, even if Congress attempts to authorize them to do so.⁸¹ Article III, however, does not bind state courts, and some of them have looser justiciability limitations than the federal courts.⁸² The Supreme Court has, at times, suggested that the political question doctrine also stems from Article III.⁸³ But if that were so, it would seem to produce the anomalous result that state courts could adjudicate political questions, including sensitive separation-of-powers matters, that the federal courts were unable to decide.⁸⁴ Because of this, some scholars have argued that the political question doctrine emanates, at least in part, from the substantive federal law at issue in the cases, and that this law is binding on the states.⁸⁵

In sum, the nature, scope, and legitimacy of the political question doctrine have long been the subject of debate, and the periodic waves of scholarly

78. *Id.* at 1485.

79. *Id.*

80. *See, e.g.,* *Allen v. Wright*, 468 U.S. 737, 750 (1984).

81. *See, e.g.,* *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576-78 (1992).

82. *See, e.g.,* *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts . . .”). Although outside the scope of this Article, many state courts have their own version of a political question doctrine for state law claims, which is often modeled on *Baker v. Carr*. *See* Nat Stern, *Don’t Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 180, 182-83 (2018).

83. *See, e.g.,* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“The doctrines of mootness, ripeness, and political question all originate in Article III’s ‘case’ or ‘controversy’ language, no less than standing does.”).

84. *See, e.g.,* *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring in the judgment) (“This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot, . . . so long as they do not trench upon exclusively federal questions of foreign policy.”).

85. *See, e.g.,* *Dodson*, *supra* note 2, at 719; *Harrison*, *supra* note 72, at 493.

reflection and reassessment—often triggered by particular Supreme Court decisions—have failed to generate consensus.

C. Common Assumptions in the Literature

Despite the widely differing views about the nature, scope, and legitimacy of the political question doctrine, there is one thing that the scholarship has in common: It is almost entirely focused on the Supreme Court. Indeed, debates over the doctrine (such as between Wechsler and Bickel) often boil down to differing, and irreconcilable, conceptions of the Supreme Court's role. Most scholars discussing the doctrine either say nothing about lower court practice or make only a passing reference to it.⁸⁶ A few scholars have gone further and discussed select lower court decisions,⁸⁷ but no one has systematically examined or attempted to catalogue what the lower courts have been doing. In part because of its focus on the Supreme Court, modern scholarship tends to make the following four assumptions about the doctrine.

First, scholars have assumed the doctrine is not very vibrant. Especially since *Bush v. Gore*, commentators have suggested that the doctrine is in serious decline.⁸⁸ Indeed, noting that the Supreme Court rarely applies the doctrine, some scholars have attempted to discern why the Court retains it at all.⁸⁹ Accounts of the doctrine's decline would seem to be supported by the Court's

86. See, e.g., Barkow, *supra* note 46, at 267 n.158 (observing in a footnote that “[t]he doctrine is still applied with some frequency, however, by lower courts in cases involving foreign relations”); Fallon, *supra* note 4, at 1487 n.22 (observing in a footnote that “[t]he doctrine appears to have a greater importance in the lower courts”); Grove, *supra* note 67, at 1913 n.20 (observing that whether the doctrine is applied differently by the lower courts is “an interesting question” and that the author hoped to pursue it in future work); see also BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 48, at 198 (“I have not addressed myself, in this chapter or elsewhere, to the role of the lower federal courts, of which the Supreme Court is the hierarchic head.”).

87. See, e.g., Cohen, *supra* note 7, at 14-16; Goldsmith, *supra* note 7, at 1402-03; Harrison, *supra* note 72, at 512-17; J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 106-08 (1988). Of these treatments, Harrison's is the most extensive and is part of an argument that the lower courts have improperly treated the doctrine as a jurisdictional limitation. But even he examines only a handful of lower court decisions.

88. See, e.g., Barkow, *supra* note 46, at 300; see also Jesse H. Choper, *Introduction to THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 1, 1 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (“[S]cholars have concluded that political questions are in serious decline, if not fully expired”); Grove, *supra* note 67, at 1910 (“[S]cholars claim that this longstanding doctrine has recently been on the decline.”).

89. See, e.g., Fallon, *supra* note 4, at 1482 & n.1 (“Some commentators deny that [the political question doctrine] should exist at all.”).

insistence at times that the obligation of the federal courts to exercise their jurisdiction is “virtually unflagging.”⁹⁰

Second, modern scholarship tends to view the doctrine as applicable only (or at least primarily) in constitutional cases.⁹¹ Indeed, this assumption has been a core part of the critique of the doctrine: Scholars have argued that, in declining to adjudicate constitutional disputes, the courts have abdicated a core judicial function.⁹² It is also a key part of the historical claim that the modern political question doctrine is radically different from the traditional political question doctrine.⁹³

Third, the literature has assumed that, to the extent the doctrine still has life, the prudential version of the doctrine advocated by Finkelstein and Bickel (which is especially reflected in the fourth, fifth, and sixth factors recited in *Baker*)⁹⁴ is in disfavor, even in foreign affairs.⁹⁵ Relatedly, commentators have suggested that the Supreme Court substantially narrowed the scope of the doctrine in *Zivotofsky*.⁹⁶

90. See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014) (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

91. See, e.g., CHEMERINSKY, *supra* note 2, § 2.6.1, at 164 (discussing the political question doctrine only with respect to constitutional claims); Choper, *supra* note 64, at 1461 (defining political questions only in terms of constitutional issues); Fallon, *supra* note 4, at 1495 (“Most modern political question disputes have turned on whether the Constitution entrusts the resolution of constitutional questions to an institution other than the judiciary, typically through a textually demonstrable commitment of decision-making authority.”); Redish, *supra* note 57, at 1031 (“The so-called ‘political question’ doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution.”).

92. See, e.g., Mulhern, *supra* note 87, at 99 (noting that critiques of the political question doctrine “are based on the same two intertwined assumptions: 1) the judiciary is the only institution with the authority and capacity to interpret the Constitution and 2) to limit the judicial monopoly on constitutional interpretation is to threaten, if not destroy, the rule of law”).

93. See, e.g., Grove, *supra* note 67, at 1911-12 (contending that the political question doctrine did not historically extend to constitutional claims).

94. See *supra* text accompanying notes 18, 40-51.

95. See, e.g., Tushnet, *supra* note 62, at 1213 (“[T]he [Supreme] 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.”).

96. See Cohen, *supra* note 7, at 4 (describing *Zivotofsky* as “narrowing the scope of the political question doctrine”); Michael D. Ramsey, *War Powers Litigation After Zivotofsky v. Clinton*, 21 CHAP. L. REV. 177, 178-79 (2018) (“*Zivotofsky v. Clinton* appears to signal a major shift in thinking about justiciability in separation of powers disputes.”); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1925-26 (2015) (“[T]he Court’s decision in *Zivotofsky v. Clinton* is of far-reaching significance.”).

Fourth, scholars generally assume that, when applied, the political question doctrine permanently bars judicial review of an issue. This assumption is an important part of the “judicial abdication” critique of the doctrine.⁹⁷

As will become apparent, a close look at the lower court practice unsettles each of these assumptions.

II. Empirics

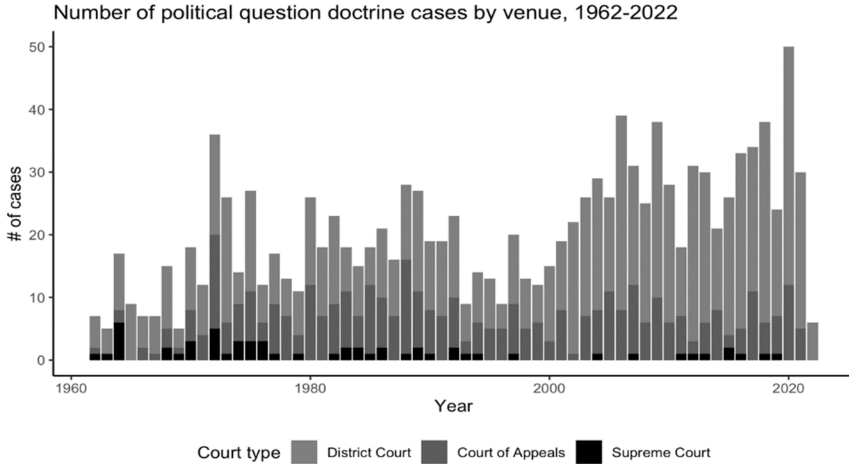
This Part presents an empirical account of how the political question doctrine has operated in the lower federal courts since *Baker*. It begins with a quantitative assessment, based on a coding of a sample of lower court decisions. It then offers a qualitative description of various contexts in which the courts have applied the doctrine, especially in cases relating to foreign affairs.

A. A Quantitative Assessment

To obtain a picture of the operation of the political question doctrine in the lower courts, we first completed a search on Westlaw for all lower court decisions referring to the doctrine from March 26, 1962 (the date *Baker v. Carr* was decided) to March 31, 2022. The search terms were: (Baker +5 Carr) & “political question.” The search yielded 1,200 cases in the federal district courts and courts of appeal, spread across time as shown in Figure 1.

97. See, e.g., Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 232 (1985) (“[W]hile a case dismissed because of party status might subsequently be adjudicated in other circumstances, a political question, as a non-justiciable *issue*, would, like the ancient mariner, forever roam the seas, never to be resolved.”); Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1039 (2012) (“The ‘political question’ doctrine also carves out large domains in which judicial settlement of a constitutional question will never be available, even when judicially cognizable harms have occurred.”); Redish, *supra* note 57, at 1060 (“While the so-called ‘undemocratic’ nature of judicial review could conceivably justify an appropriate degree of judicial deference to the political branches in certain cases, it cannot justify total judicial abdication, at least without undermining the use of judicial review in all of its applications.”). *But cf.* CHEMERINSKY, *supra* note 2, § 2.6.2, at 170 (noting that “it is uncertain whether the political question doctrine is constitutional, prudential, or both,” and asking, “[c]ould Congress direct the federal courts to adjudicate a matter that the Supreme Court deemed to be a political question?”).

Figure 1
References to the Political Question Doctrine



This trend line does not suggest any diminishment of the doctrine over time,⁹⁸ even after the Supreme Court decisions in *Bush v. Gore* (2000) and *Zivotofsky v. Clinton* (2012).⁹⁹ The numbers are hard to interpret, however, for two reasons: They cannot be interpreted without a basis of comparison, given that the total number of cases changed over time and the search results include cases in which the doctrine was referred to in passing but did not provide the basis for decision. To address the first problem, we conducted searches of other widely discussed doctrines that arise in foreign affairs cases. (We chose foreign affairs doctrines as comparators because, as will become apparent, the political

98. There are more cases reported today than in the past, but the increase is in the neighborhood of two to three times, and so accordingly the rate of political question cases has increased, although less than the figure suggests. The caseload in the federal courts of appeals has actually dropped in the last twenty years.

99. After the Supreme Court's 2012 decision in *Zivotofsky v. Clinton*, a number of commentators suggested that the decision would substantially restrict application of the political question doctrine. See *supra* text accompanying note 96. This does not appear to have happened. We ran the search that we used for Figure 1, above, and limited it to the ten years before *Zivotofsky* and the ten years after *Zivotofsky*, and the political question doctrine is discussed more often in the subsequent period, 337 times, than in the previous, 304 times.

question doctrine is often applied in the foreign affairs context.)¹⁰⁰ Table 1 provides our results (as well as counts for Supreme Court cases).

Table 1
Comparison of References by Courts to Other Doctrines

Case Search Criteria	Supreme Court	District Court and Court of Appeals	Total
“act of state” /200 Sabbatino	10	442	452
“self-executing” /5 “treaty”	10	590	600
“Charming Betsy” & “international law”	8	137	145
“international comity” /5 “doctrine”	1	377	378
(<i>Baker</i> +5 <i>Carr</i>) & “political question”	58	1,200	1,258

The results show that the political question doctrine is alive and well in the lower courts. Lower courts discuss the doctrine more frequently than many other widely discussed doctrines, including the act of state doctrine, the doctrine of treaty self-execution, the *Charming Betsy* canon of statutory interpretation, and the doctrine of international comity.¹⁰¹

To address the second problem, we coded a sample of 120 cases.¹⁰² To compile this sample, we used the search term, (*Baker* +5 *Carr*) & “political question,” in the Westlaw federal courts database. To ensure that we would be able to detect changes in the use of the political doctrine over time, we used a stratified approach that involved randomly selecting ten cases from each five-year period since 1962, the year that *Baker v. Carr* was decided. Of the 120 cases

100. See *infra* Table 5.

101. The literature on each of these doctrines is vast. For citations to some of the literature, see CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 102, 135-36, 285-86, 538-39 (7th ed. 2020).

102. We chose a sample of 120 cases because it gave us less than a 10% margin of error for a population of 1200 cases, see *Sample Size Calculator*, CALCULATOR.NET, <https://perma.cc/L3RS-XYVM>, and enabled us to cover the time period with a consistent number of cases at five year intervals, as discussed below.

generated from this search, 38 were irrelevant—typically because the court drew an analogy to the political question doctrine or a political question case but did not face the question of whether the political question applied to the facts at hand. We threw out those cases, and so our sample consisted of 82 cases.

Table 2 provides our headline results. In 52% of the 82-case sample, the court dismissed the case based on the political question doctrine (PQD). This number indicates that the political question doctrine matters to judicial outcomes. If the doctrine were just a flourish, then the dismissal rate would have been 0% or close to it. Moreover, in 62% of the cases, the court invoked a *Baker* factor, further indicating that the court actually applied the doctrine (in the sense of mentioning it and applying it to the facts) rather than merely citing it without relying on it. Perhaps most importantly, in 33% of the cases, the Court cited one of the *Baker* factors commonly referred to as prudential (factors four through six). If courts cited *Baker* merely for the proposition that a “textually-demonstrable constitutional commitment” resolved the issue, and then dismissed the case on that basis, then citations to *Baker* might count as no more than indirect confirmation that the Constitution sometimes resolves cases. It appears instead that the lower courts frequently use the political question doctrine to dismiss cases for prudential reasons.¹⁰³ Lastly, 39% of the cases in this sample involve foreign affairs; we will return to this figure below in connection with a second coding we conducted focusing on recent decisions.

Table 2
General Findings

	Percentage
Applies PQD as basis for dismissal	52
<i>Baker</i> factor cited	62
Prudential <i>Baker</i> factor (4-6) cited	33
Concerning foreign affairs (including military affairs and war)	39

Table 3 shows the percentage of cases by type of claim. A majority of the cases in our sample involved only nonconstitutional claims.

103. Most (75%) of the district court cases were not appealed; 15% were affirmed, and 10% were reversed.

Table 3
Frequency of Types of Claims Post-*Baker*

Claim Type	Percentage
Common law	14
International law	17
Federal statute	53
State law	16
Constitutional law	36

Finally, we were curious which *Baker* factors courts relied on when they cited them as a basis for dismissal. As noted in Table 2, courts cited at least one *Baker* factor in a majority of the cases in our data set. And, as the following Table shows, the prudential factors were cited frequently in cases applying the doctrine as a basis for dismissal.

Table 4
Baker Factors Invoked in Cases Applying the
Political Question Doctrine as a Basis for Dismissal

<i>Baker</i> factor	Percentage
(1) Textually-demonstrable constitutional commitment	82
(2) Lack of judicially discoverable and manageable standards	73
(3) Impossibility of deciding without a policy determination	55
(4) Impossibility of court's undertaking independent resolution without expressing a lack of respect due to coordinate branches	49
(5) Unusual need for unquestioning adherence to a political decision already made	35
(6) The potentiality of embarrassment from multifarious pronouncements	43

The table shows that the lower courts invoke the full range of factors from *Baker*, including the factors that have traditionally been labeled as prudential—that is, factors four through six.

The cases in our sample also display an interesting evolution of the political question doctrine over time. All of the earliest cases from the 1960s involve state election law, the subject of *Baker v. Carr*. These cases were relatively tightly reasoned efforts to determine whether a plaintiff had an equal protection claim to challenge various state laws regulating elections. In the 1970s, the foreign relations cases make their appearance as plaintiffs

challenged U.S. law and policy relating to the war in Vietnam and then a wide variety of other governmental foreign affairs actions.¹⁰⁴ By the late 1970s and 1980s, the political question doctrine had taken modern shape in the form of an all-purpose device for dismissing cases that, for one reason or another, the courts felt unsuited to resolve. Cases involved criminal statutes, civil forfeiture, employment disputes, arbitration, First Amendment claims, immigration law, education, nuisance law, and tax law—not to mention the bread-and-butter separation-of-powers cases relating to the authority of the executive, legislatures, and courts. *Baker* no longer stood for the justiciability of a particular constitutional cause of action, but for the lack of justiciability of a range of claims that might otherwise have been read into the Constitution, statutes, or the common law.

If the Supreme Court sought in *Baker* to cabin the political question doctrine, as conventional wisdom indicates, then it failed. It instead inspired the lower courts with a new sense of their power to dismiss cases on prudential grounds, thus forestalling the development of new claims, especially those touching on foreign relations.

To double-check our observation about the growing application of the political question doctrine in the foreign affairs context, we conducted another search, this time focused on modern applications of the doctrine. To do this, we compiled and coded all cases discussing the political question doctrine in the third year of each presidential administration, starting in 1987. (We picked the third year to avoid confounding factors that might be associated with the beginning and end of presidential administrations, when concerns about judicial interference in political decisions might be more salient.) Our findings from this sample are consistent with those from the more general sample, except that foreign affairs cases are even more prevalent.

The modern case sample yielded 101 decisions. After reviewing them, we determined that 20 were irrelevant (that is, they did not consider whether to apply the doctrine), resulting in 81 relevant decisions. The following table illustrates the coding of these 81 decisions.

104. *See, e.g.,* United States v. Garrity, 433 F.2d 649, 650 (8th Cir. 1970).

Table 5
Modern Cases

	Percentage
Applies PQD as basis for dismissal	51
<i>Baker</i> factor cited	51
Prudential <i>Baker</i> factor cited	30
Concerning foreign affairs (including military affairs and war)	72
Only nonconstitutional claims	64

As can be seen from this table, of the relevant decisions in this sample, 72% concerned foreign affairs. This is substantially higher than the 39% figure from our more general sample that dates back to 1962.¹⁰⁵ Moreover, we determined that, of the 41 cases in the sample that actually applied the political question doctrine as a basis for dismissal, which was 51% of the relevant cases, 32 concerned foreign affairs, which is 78%. The other figures, by contrast, are similar to those in the more general sample, with respect to invocations of the prudential *Baker* factors and the prevalence of nonconstitutional claims. What has changed is the increased prevalence of foreign affairs cases that are viewed as implicating the political question doctrine. Our data does not allow us to identify the causes of this change. It may stem from other doctrinal changes (such as the allowance of constitutional damages remedies, new interpretations of the Alien Tort Statute, and the like) that made it easier to challenge government action, or from other factors (such as developments in the world or in international law) that affected the nature of the challenges being pursued in the federal courts.

105. See *supra* Table 2.

B. A Qualitative Assessment of the Foreign Affairs Cases

In order to obtain a better sense of how the doctrine is used by the lower courts, we read fifty decisions that applied the doctrine as a basis for dismissal since *Baker*. We focused on foreign affairs cases in light of their prevalence in our coding.¹⁰⁶ Based on that exercise, we describe here six categories of cases:

1. Treating Nonjudicial Determinations as Conclusive
2. Refusing to Direct Exercises of Governmental Discretion
3. Abstaining from Deciding Separation of Powers Disputes
4. Claims Concerning Actions of the U.S. Government Abroad
5. Claims Concerning Actions by Private Companies Abroad
6. The Rights and Liabilities of Foreign Nations

These categories are not exhaustive and unavoidably overlap, but they provide a sense of some of the common foreign affairs applications. Because other scholars have not systematically examined what the lower courts have been doing, this is the first taxonomy of its kind.

1. Treating nonjudicial determinations as conclusive

In some of the political question decisions, the lower courts simply treat the determinations of political actors as conclusive for purposes of adjudication. These are the types of cases that are at the core of Louis Henkin's skepticism about whether there really was, at least historically, a political question doctrine.¹⁰⁷ One way of thinking about the political question decisions in this category is that they are simply a strong form of judicial deference.¹⁰⁸

106. We thus do not address here the various ways in which political question issues have arisen in election-related disputes since *Baker*, including in disputes over partisan gerrymandering prior to *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Nor, relatedly, do we discuss challenges under the Guarantee Clause. See, e.g., *Democratic Party of Wis. v. Vos*, 966 F.3d 581, 588-90 (7th Cir. 2020).

107. See Henkin, *supra* note 56, at 601 (suggesting that the Supreme Court decisions that historically involved political questions were simply situations in which “the Court refused to invalidate the challenged actions because they were within the constitutional authority of [the] President or Congress”).

108. See, e.g., Barkow, *supra* note 46, at 319 (“The political question doctrine is part of a spectrum of deference to the political branches’ interpretation of the Constitution.”); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 651 (2000) (“‘Deference’ in foreign affairs can mean a variety of propositions, ranging from the weight given to an argument based on its persuasive power, to acceptance of the executive branch’s views of international facts, to judicial abstention under the political question doctrine.”).

An example is the Third Circuit's decision in *Americans United for Separation of Church and State v. Reagan*.¹⁰⁹ In that case, a public interest group and others brought First Amendment and Equal Protection challenges to President Reagan's diplomatic recognition of the Vatican as well as congressional funding of the U.S. mission to the Vatican. The court held that the case presented a political question, reasoning that "[i]t has long been settled that the President's resolution of such questions constitutes a judicially unreviewable political decision."¹¹⁰ The court could just have well said that the President has a plenary recognition power.¹¹¹ The reliance on the political question doctrine merely surfaced the reason for that rule: The courts lack the expertise and authority to evaluate diplomatic judgments.

A more recent example of this use of the political question doctrine is in *Arias Leiva v. Warden*.¹¹² There, the Eleventh Circuit declined to consider an argument, made by a person being extradited by the United States to Colombia, that the extradition treaty between the two countries was invalid because of a ruling by the Colombian Supreme Court declaring Colombia's ratification of the treaty to be unconstitutional. The court explained that whether a foreign power has properly ratified a treaty is a political question and that, because the U.S. executive branch had taken the position that the treaty was in effect, "[w]e therefore have no answer but this: the Treaty remains in effect."¹¹³

The cases in this category tend to be cases involving constitutional authority, thus aligning with the first *Baker v. Carr* factor—although, contrary to that factor, they often do not identify a clear commitment in the constitutional text, and sometimes the references to the first factor are merely to a general principle, like the executive branch's authority over foreign affairs. But similar issues can come up in the statutory context. A recent example is *Center for Biological Diversity v. Trump*.¹¹⁴ In that case, a public interest group challenged President Trump's declaration of a national emergency under the National Emergency Act, as part of his effort to build a southern border wall, arguing that there was no genuine emergency. The court concluded that this "is a quintessential political question," emphasizing that it lacked sufficient expertise or information to second-guess a national emergency declaration.¹¹⁵

109. 786 F.2d 194 (3d Cir. 1986).

110. *Id.* at 197, 201.

111. *See, e.g.,* *Lin v. United States*, 561 F.3d 502, 506 (D.C. Cir. 2009) (using a similar version of the political question doctrine, concerning the status of Taiwan).

112. 928 F.3d 1281 (11th Cir. 2019).

113. *Id.* at 1283, 1288.

114. 453 F. Supp. 3d 11 (D.D.C. 2020).

115. *Id.* at 21-22, 31.

2. Refusing to direct certain exercises of governmental discretion

A partly overlapping category of cases involves situations in which relief is being sought that, if granted, would require the courts to direct the government's exercise of its discretionary authority. The concerns at issue here are also evident in other areas of justiciability doctrine, such as the law of standing.¹¹⁶

An example of a lower court decision along these lines is *Republic of the Marshall Islands v. United States*.¹¹⁷ In that case, the Marshall Islands attempted to compel the U.S. government to pursue good faith negotiations on nuclear disarmament, as called for in the Treaty on the Non-Proliferation of Nuclear Weapons. In addition to concluding that the treaty obligation was not self-executing and thus not judicially enforceable, the Ninth Circuit held that the case presented a political question. The court reasoned that the Constitution gives the political branches authority over the conduct of foreign relations and that the requested relief would interfere with the exercise of that authority, especially given the "array of vague terms and a dearth of applicable standards" in the treaty.¹¹⁸

3. Abstention from deciding certain separation-of-powers disputes

In this third category of cases, the courts do not claim that the action being challenged is valid or within an allowable range of discretion. Rather, they decline to resolve a constitutional issue (usually involving the separation of powers), leaving that issue instead to be worked out through political contestation. These are true non-justiciability decisions rather than rulings on the merits, although they have the effect of leaving in place the challenged activity.

Some of the early post-*Baker* decisions in this line of cases involved challenges to the legality of the Vietnam War. In a number of these decisions, the courts held that the challenges presented political questions, although some courts in this period reached the merits and concluded that the war had been sufficiently authorized by Congress.¹¹⁹ Illustrative of the decisions applying

116. See, e.g., *Allen v. Wright*, 468 U.S. 737, 761 (1984) (reasoning, in a suit seeking to force the IRS to better police the disallowance of tax-exempt status for racially discriminatory private schools, that separation of powers "counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties"), *abrogated in other part by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

117. 865 F.3d 1187 (9th Cir. 2017).

118. *Id.* at 1190, 1201.

119. Cf. *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971) (holding that the legality of the war was not a political question, but reasoning that "the constitutional propriety of
footnote continued on next page

the political question doctrine is *Luftig v. McNamara*.¹²⁰ In that case, a U.S. service member argued that the war was unconstitutional and sought injunctive and declaratory relief to prevent the government from sending him to fight. The district court held that the suit presented a nonjusticiable political question, and the D.C. Circuit affirmed in a brief per curiam opinion, reasoning that: “The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.”¹²¹

Courts have applied the political question doctrine in many subsequent war powers disputes. For example, in *Crockett v. Reagan*,¹²² twenty-nine members of Congress sought a ruling that the Reagan Administration’s provisions of equipment and advisors in El Salvador for use in its internal conflict was in violation of the Constitution and the War Powers Resolution. The district court dismissed the case based on the political question doctrine, reasoning, among other things, that “the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador [within the meaning of the War Powers Resolution] renders this case in its current posture non-justiciable.”¹²³ The D.C. Circuit affirmed, saying that it could “find no error in the judgment of the District Court.”¹²⁴

Other separation-of-powers cases relating to foreign affairs have also been dismissed under the political question doctrine. In *Made in the USA Foundation v. United States*,¹²⁵ a trade association challenged the constitutionality of the North American Free Trade Agreement (NAFTA), which had been approved by a majority of Congress, on the ground that it was a treaty within the meaning of Article II of the Constitution and thus required approval by two-thirds of the Senate. The Eleventh Circuit “affirm[ed] the principle, as enunciated by the U.S. Supreme Court, that certain international agreements may well require Senate ratification as treaties through the constitutionally-mandated procedures of Art. II, § 2,” but declined to decide whether NAFTA was one of them:

We only conclude that in the context of international commercial agreements such as NAFTA—given the added factor of Congress’s constitutionally-

the *means* by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question” (emphasis added)).

120. 373 F.2d 664 (D.C. Cir. 1967).

121. *Id.* at 665-66.

122. 558 F. Supp. 893 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam).

123. *Id.* at 895, 898.

124. *Crockett*, 720 F.2d at 1357.

125. 242 F.3d 1300 (11th Cir. 2001).

enumerated power to regulate commerce with foreign nations, as well as the lack of judicially manageable standards to determine when an agreement is significant enough to qualify as a “treaty”—the issue of what kinds of agreements require Senate ratification pursuant to the Art. II, § 2 procedures presents a nonjusticiable political question.¹²⁶

The court seemed especially concerned about the lack of judicially manageable standards for deciding which agreements constitute treaties requiring Senate approval and which do not.¹²⁷ The court also gave significant weight to the prudential *Baker* factors, emphasizing in particular “(1) the necessity of federal uniformity; (2) the potential effect of an adverse judicial decision on the nation’s economy and foreign relations; and (3) the respect courts should pay to coordinate branches of the federal government.”¹²⁸

4. Claims concerning actions of the U.S. government abroad

Many of the modern lower court decisions applying the political question doctrine do not involve constitutional challenges. Instead, they involve tort claims against U.S. government actors (usually executive officials) for injuries or property damage sustained abroad, often in connection with U.S. military activities. These cases typically allege violations of federal statutes, international law, or state law. Lower courts rely on the political question doctrine in these cases even though in many of them the defendants have strong arguments for immunity from suit.

The backdrop of these cases is the Federal Tort Claims Act (FTCA), in which the U.S. government has waived some of its sovereign immunity from tort claims.¹²⁹ There are a number of limitations on its waiver of immunity, however, including for certain discretionary functions, for claims “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” and for claims “arising in a foreign country.”¹³⁰ Moreover, when a government employee is sued in tort, the Westfall Act provides that the U.S. government is to be substituted as the defendant (thereby triggering the limits of the FTCA) if the Attorney General certifies that the employee was acting within the scope of their employment at the time of the incident in question.¹³¹ The Supreme Court has held, though, that this certification is

126. *Id.* at 1302, 1319-20.

127. *See id.* at 1316.

128. *Id.* at 1317.

129. 28 U.S.C. § 2674.

130. 28 U.S.C. § 2680.

131. 28 U.S.C. § 2679.

reviewable by the courts.¹³² In addition, the Westfall Act does not apply to constitutional claims.¹³³

An example of a political question decision in this line of cases is *Greenham Women Against Cruise Missiles v. Reagan*.¹³⁴ That case involved a tort action by residents of the United Kingdom, including a U.S. citizen, concerning the United States' deployment of cruise missiles at a base there. They argued that the deployment violated various principles of international law and that, by increasing the risk of a nuclear war, violated their constitutional rights. In dismissing the challenge as raising a political question, the district court explained:

A review of plaintiffs' pleadings and exhibits reveals that if the merits were reached, the court would have to determine whether the United States by deploying cruise missiles is acting aggressively rather than defensively, increasing significantly the risk of incalculable death and destruction rather than decreasing such risk, and making war rather than promoting peace and stability.¹³⁵

The Second Circuit affirmed in a short per curiam opinion, emphasizing the first and third *Baker* factors.¹³⁶

Another, more recent example is *Schneider v. Kissinger*.¹³⁷ In that case, family members of a Chilean general who had been killed in the 1970s sued both the U.S. government and Henry Kissinger for helping to cause the attempted kidnapping and murder of the general through their support of a military coup in Chile. The district court dismissed the case based on the political question doctrine and, in the alternative, sovereign immunity.¹³⁸ The D.C. Circuit affirmed based only on the political question doctrine and declined to address the immunity issue. Proceeding through the six *Baker* factors, the court concluded that most of these factors supported dismissal. For example, applying the first *Baker* factor, the court observed that "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government."¹³⁹ The court also reasoned that adjudicating the case would pull the court into evaluating sensitive foreign policy decisions, such as whether and to what extent it is appropriate to conduct covert

132. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

133. 28 U.S.C. § 2679(b)(2)(A).

134. 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34, 37 (2d Cir. 1985) (per curiam).

135. *Id.* at 1332, 1337.

136. *Reagan*, 755 F.2d at 37.

137. 412 F.3d 190 (D.C. Cir. 2005).

138. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 254 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005).

139. *Schneider*, 412 F.3d at 194.

operations to influence political developments in another country.¹⁴⁰ By dismissing based on the political question doctrine, the court was able to avoid having to review the Attorney General's Westfall Act certification that Kissinger had acted within the scope of his employment.

A similar application of the political question doctrine is the D.C. Circuit's decision in *Bancoult v. McNamara*.¹⁴¹ That case involved claims, brought under the Alien Tort Statute, alleging that U.S. officials had violated international law by forcibly relocating people living in the Chagos Islands in order to establish a naval base there.¹⁴² The Attorney General certified under the Westfall Act that the officials had been acting within the scope of their employment, and the district court therefore substituted the U.S. government as the defendant and dismissed on the basis of FTCA immunity. The D.C. Circuit affirmed based on the political question doctrine, reasoning: "If we were to hold that the executive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence."¹⁴³

Many of these decisions are from the D.C. Circuit, probably because the U.S. government and its officials are more likely to be sued there.¹⁴⁴ But other circuits also issue these decisions. A noteworthy example is the Eleventh Circuit's decision in *Aktepe v. United States*.¹⁴⁵ In that case, Turkish sailors sued the U.S. government after their vessel was struck by missiles fired by a U.S. vessel during a NATO training exercise (members of the U.S. missile firing team apparently were not told that it was merely a drill). The court proceeded through the *Baker* factors and concluded that the case presented a political question "because it would require a court to interject itself into military decisionmaking and foreign policy, areas the Constitution has committed to coordinate branches of government."¹⁴⁶

140. *Id.* at 197-98.

141. 445 F.3d 427 (D.C. Cir. 2006).

142. *Id.* at 430-31. The Alien Tort Statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

143. *Bancoult*, 445 F.3d at 437.

144. Washington, D.C. is the home of the federal government, and venue is appropriate where (among other places) the defendant resides. Moreover, some agency actions can be reviewed only in the D.C. Circuit. In their petition for certiorari in *Zivotofsky*, the petitioners complained about what they alleged was the D.C. Circuit's especially expansive approach to the political question doctrine. *See* Petition for a Writ of Certiorari at 13-14, *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (No. 10-699), 2010 WL 4876477.

145. 105 F.3d 1400 (11th Cir. 1997).

146. *Id.* at 1401-02, 1404.

5. Claims concerning actions by private companies abroad

Lower courts have also applied the political question doctrine in several cases brought against private companies for their actions abroad, when the companies were either acting as government contractors or were engaged in activities parallel to those engaged in by the government. One way of understanding these decisions is that they prevent circumvention of limiting doctrines, including the political question doctrine, that may apply if the suit were brought directly against the government.

By way of background, there is no provision in the FTCA conferring immunity on the government's contractors. Nor does the *Feres* doctrine, which bars suits against the government by military servicemembers for injuries or death sustained "incident to service,"¹⁴⁷ apply to private contractors. The Supreme Court held in *Boyle v. United Technologies Corp.*, however, that military contractors are entitled to some tort immunity as a matter of federal common law and that this federal common law preempts inconsistent state tort law.¹⁴⁸ That decision is controversial,¹⁴⁹ and, in any event, it addresses only immunity for military contractors and only with respect to certain product design claims, making it unclear whether and to what extent there is additional federal common law immunity for government contractors.

Another in this line of cases is the Ninth Circuit's decision in *Corrie v. Caterpillar, Inc.*¹⁵⁰ The Israeli military demolished homes in the Palestinian Territories, using bulldozers supplied by Caterpillar and causing injuries, deaths, and loss of property, allegedly in violation of international law. In addition to concluding that the plaintiffs had failed to state a legal claim, the district court reasoned that the case should be dismissed under the political question doctrine "because it interferes with the foreign policy of the United States of America," given that "neither of the other branches of government has urged or enjoined sale of weapons to Israel nor restrained trade with Israel in any other manner."¹⁵¹ On appeal, the Ninth Circuit affirmed based on the political question doctrine, emphasizing that Caterpillar's sales to Israel were financed by the U.S. government. The court said, "[i]t is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs'

147. *Feres v. United States*, 340 U.S. 135, 146 (1950).

148. 487 U.S. 500, 512 (1988).

149. See, e.g., Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 962 (1996) ("Boyle is one of the Court's most troubling federal common law opinions.").

150. 503 F.3d 974 (9th Cir. 2007).

151. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007).

family members.”¹⁵² The court relied heavily on the prudential *Baker* factors, saying that it was “mindful of the potential for causing international embarrassment were a federal court to undermine foreign policy decisions in the sensitive context of the Israeli-Palestinian conflict.”¹⁵³

Another example of a court applying the political question doctrine in a suit against a government contractor is the Eleventh Circuit’s decision in *Carmichael v. Kellogg, Brown & Root Services, Inc.*¹⁵⁴ In that case, after a U.S. soldier was injured in Iraq when his truck rolled over, his wife sued the military contractor allegedly responsible for the accident. The court held that the political question doctrine applied because the suit would require it to examine military policy decisions: “Because the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, it would be impossible to make any determination regarding [the defendants’] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny.”¹⁵⁵ The court further stated: “[W]e conclude that adjudicating the plaintiff’s claims would require extensive reexamination and second-guessing of many sensitive judgments surrounding the conduct of a military convoy in war time—including its timing, size, configurations, speed, and force protection.”¹⁵⁶

To be clear, courts do not always apply the political question doctrine in cases brought against contractors for their actions abroad. Rather, it seems to depend on whether the court thinks it will be required to assess U.S. foreign policy or security decisions—matters that courts view as falling outside their authority and competence, especially in the absence of clear legal guidance.¹⁵⁷

6. The rights and liabilities of foreign nations

In other political question decisions, the lower courts decline to take a position about the actions or claims of foreign nations. This version of the doctrine overlaps with both the act of state doctrine, under which courts

152. *Corrie*, 503 F.3d at 982.

153. *Id.* at 984.

154. 572 F.3d 1271 (11th Cir. 2009).

155. *Id.* at 1275, 1282-83.

156. *Id.* at 1275.

157. *See, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530, 537 (4th Cir. 2014); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1360 (11th Cir. 2007); *Lane v. Halliburton*, 529 F.3d 548, 563 (5th Cir. 2008). In these decisions, the courts said that more factual development would be needed before determining whether political questions were presented.

presume the validity of what foreign governments do in their own territory,¹⁵⁸ and foreign sovereign immunity, which is governed today by the Foreign Sovereign Immunities Act (FSIA).¹⁵⁹ Both bodies of law have limitations. For example, the act of state doctrine applies only to actions by foreign states within their own territory,¹⁶⁰ and it does not speak to situations in which there are conflicting claims between foreign governments. And the FSIA has various exceptions to immunity, some of which have uncertain scope.¹⁶¹

An example of a decision in this line of cases is *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*,¹⁶² which concerned a dispute over rights to oil extracted from the Persian Gulf, the resolution of which would require resolving a territorial dispute between foreign nations. The court reasoned: “The ownership of lands disputed by foreign sovereigns is a political question of foreign relations, the resolution or neutrality of which is committed to the executive branch by the Constitution.”¹⁶³

A more recent example that fits within this category is *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*¹⁶⁴ In that case, gas retailers sued oil production companies that were owned wholly or in part by member nations of the Organization of the Petroleum Exporting Countries (OPEC), alleging antitrust violations. The Fifth Circuit held that the case presented a political question because the claims “effectively challenge the structure of OPEC and its relation to the worldwide production of petroleum” and thus “deeply implicate concerns of foreign and defense policy, concerns that constitutionally belong

158. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-28 (1964); see also 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3534.2.1, at 805 (3d ed. 2008) (noting that the “[a]ct-of-state doctrine is at least a close cousin of political-question doctrine, given the clear emphasis on separation-of-powers concerns”); cf. *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938, 954 (5th Cir. 2011) (“[M]any of these arguments [for application of the act of state doctrine] coincide with those that have animated our decision on political question grounds.”); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983) (“The act of state doctrine is essentially the foreign counterpart to the political question doctrine. Both doctrines require courts to defer to the executive or legislative branches of government when those branches are better equipped to handle a politically sensitive issue.”).

159. See 28 U.S.C. §§ 1602-1611.

160. See *W.S. Kirkpatrick & Co. v. Env’t Tectonics Corp., Int’l*, 493 U.S. 400, 405 (1990) (“In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.”).

161. See 28 U.S.C. § 1605.

162. 577 F.2d 1196 (5th Cir. 1978).

163. *Id.* at 1198-1200, 1203.

164. 632 F.3d 938 (5th Cir. 2011).

in the executive and legislative departments.”¹⁶⁵ The court invoked all of the *Baker* factors, including the prudential ones.¹⁶⁶ In the alternative, the court reasoned that the plaintiffs’ claims were barred by the act of state doctrine.¹⁶⁷

Applications of the political question doctrine in this category sometimes overlap with sovereign immunity. Some history is relevant here: For decades prior to the enactment of the FSIA in 1976, courts gave absolute deference to the executive branch about whether to accord sovereign immunity to foreign governments in U.S. courts.¹⁶⁸ The Supreme Court in this period said that “[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”¹⁶⁹ When the executive branch did not take a position about whether immunity should be given, the courts would attempt to decide the issue themselves, albeit “in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations.”¹⁷⁰ While modern commentators do not typically tie sovereign immunity to the political question doctrine, the Supreme Court in *Baker* referred to its pre-FSIA immunity decisions as examples of the application of the political question doctrine.¹⁷¹

Under the FSIA, courts now decide foreign governmental immunity questions based on the terms of the statute rather than on executive direction. Nonetheless, the lower courts, relying on the political question doctrine, have sometimes given foreign governments immunity where the FSIA would not, at least in cases when the executive branch argues for it.

An example is *Whiteman v. Dorotheum GmbH & Co KG*.¹⁷² The Plaintiffs in this class-action suit, which was brought against Austria and its instrumentalities and related to the theft of Jewish property during the Holocaust, alleged that the case fell within various exceptions to immunity in the FSIA. The executive branch had entered into an agreement with Austria pursuant to which Austria would provide compensation out-of-court to Holocaust victims, but the distribution of the fund was being held up by this litigation. The executive branch filed a statement of interest urging dismissal.

165. *Id.* at 943.

166. *Id.* at 950-54.

167. *Id.* at 954-55.

168. See CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 242-45 (3d ed. 2021).

169. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); see also *Samantar v. Yousuf*, 560 U.S. 305, 311-13 (2010) (describing this history).

170. *Hoffman*, 324 U.S. at 35.

171. See *Baker v. Carr*, 369 U.S. 186, 213 (1962).

172. 431 F.3d 57 (2d Cir. 2005).

There was Supreme Court precedent for the proposition that an executive agreement like this one would preempt *state* law,¹⁷³ but it was less clear whether it would displace a right to sue under a federal statute like the FSIA. In a 2-1 decision, the Second Circuit decided to dismiss the case under the political question doctrine, emphasizing in particular the fourth *Baker* factor—i.e., a concern about expressing a lack of sufficient respect for the actions of the political branches.¹⁷⁴

Some decisions involving the immunity of individual foreign officials also could be described as falling within this category, although courts tend not to use the political question label. The Supreme Court held in *Samantar v. Yousuf* that such suits are not governed by the FSIA, but suggested that the officials may have common law immunity.¹⁷⁵ *Samantar* could be read to accept that, when the executive branch suggests individual official immunity, courts should treat the suggestion as dispositive (as they did with suggestions of governmental immunity prior to the enactment of the FSIA).¹⁷⁶ If so, the cases are similar to those within the first category described in this Part (i.e., treating certain nonjudicial determinations as conclusive). To date, the lower courts have given this absolute deference in suits against sitting heads of state but are divided about whether to give it in cases brought against other officials.¹⁷⁷ In these cases, the courts rely on the immunity label rather than on the political question label, but the effect is similar.

* * *

Outside the first category of decisions described above, which are effectively decisions on the merits, the major pattern of the cases is the application of the political question doctrine when the relevant legal sources (such as constitutional text, statutory provisions, common law doctrines, and international law materials) are unclear, particularly in the area of foreign relations. In these cases, the courts rely on prudential considerations relating to the limits of judicial capacity to reject challenges to government actions, thus effectively ruling for the government (and sometimes its agents) while declining to base the ruling on the merits. Many of the cases display an overlap between the operation of the political question doctrine and other limitations on judicial review—stemming, for example, from other justiciability doctrines,

173. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003).

174. *Whiteman*, 431 F.3d at 72.

175. 560 U.S. 305, 324 (2010).

176. See *id.* at 323 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”).

177. See Curtis A. Bradley, Editorial Comment, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity*, 115 AM. J. INT’L L. 1, 9 (2021).

immunity rules, the act of state doctrine, and considerations of international comity. The various doctrines apply in different, if often overlapping, factual settings but jointly work to limit judicial involvement in cases that combine political sensitivity that calls into question a court's capacity to make the right decision and legal ambiguity that would expose the court to justified criticism if it tried to do so.¹⁷⁸

III. Theory

In this Part, we begin by pointing out five ways in which our empirical account of lower court practice is inconsistent with common assumptions in the literature on the political question doctrine. We then offer a theory of the doctrine's functions that helps explain why the doctrine is more robust in the lower courts than in the Supreme Court. This theory is not intended as a causal explanation for particular applications of the doctrine, which might turn on (among other things) the ideological and methodological orientation of judges. Instead, it is an account of why the lower courts might perceive the doctrine as playing a useful role.

A. Observations from Lower Court Practice

The quantitative and qualitative picture that we have presented of lower court practice is inconsistent with assumptions that have often been made in the scholarly literature on the political question doctrine. This is true in five respects.

First, the doctrine is more vibrant than the literature suggests. Scholars have often noted that the Supreme Court rarely applies the doctrine and, in light of that, have questioned why the Court retains it at all.¹⁷⁹ Others have relatedly suggested, especially after the Court declined to apply the doctrine in *Bush v. Gore* in 2000, that the doctrine is largely moribund. This view seemed to be confirmed by the Court's 2012 decision in *Zivotofsky v. Clinton*, in which the Court declined to apply the doctrine to a sensitive foreign affairs dispute between Congress and the executive and described the political question doctrine as a "narrow exception" to the judicial duty to decide cases properly before it.¹⁸⁰ Our study of

178. Consistent with this point, lower courts sometimes expressly decline to decide whether a case implicates the political question doctrine when it appears that the case can be resolved on easier merits grounds. For a recent example, see *Schieber v. United States*, No. 21-1371, 2022 WL 227082, at *4-5 (D.D.C. Jan. 26, 2022), *argued*, No. 22-5068 (D.C. Cir. Jan. 10, 2023).

179. *See supra* text accompanying notes 88-90.

180. *See supra* text accompanying notes 34-35.

the lower courts shows that, in fact, the doctrine continues to be actively applied, including after both *Bush v. Gore* and *Zivotofsky*.

Second, the application of the doctrine is heavily concentrated in the area of foreign affairs. This by itself is not necessarily surprising. It is well known that the Supreme Court's political question decisions before *Baker* often related to foreign affairs, and the Court in *Baker* commented at length on that line of decisions.¹⁸¹ What has been less well documented is that this is also true of the lower court decisions since *Baker*, a fact easily missed if one considers only the Supreme Court, which has not applied the doctrine in a foreign affairs case since before *Baker* and declined to do so in *Zivotofsky*. To be sure, some scholars of foreign relations law have casually observed (usually critically) that the political question doctrine appears to be applied frequently by the lower courts in foreign affairs cases.¹⁸² But these observations were impressionistic rather than based on systematic empirical analysis.

Third, the lower courts often apply the doctrine in *nonconstitutional cases*—that is, cases involving claims brought under federal statutes, state law, or international law. This trend is contrary to much of the literature, which assumes that the doctrine after *Baker* primarily applies in constitutional cases, especially cases concerning the separation of powers.¹⁸³ Indeed, this assumption has been a core part of the critique of the doctrine: that, in declining to resolve disputes between Congress and the President, the courts have failed to carry out a core judicial function and have enhanced the President's constitutional authority through their inaction.¹⁸⁴ It is also a core part of the historical claim that the modern political question doctrine is radically different from the traditional political question doctrine.¹⁸⁵ In fact, a large number of the lower court political question cases concern questions of tort liability and immunity for actions taken abroad, not questions about the allocation of constitutional authority.¹⁸⁶ In this respect, the modern lower court practice overlaps with the Supreme Court's nineteenth and early twentieth century political question decisions, in which the Court often used the doctrine as a form of deference to Congress and the President on questions

181. See *Baker v. Carr*, 369 U.S. 186, 211-14 (1962).

182. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 7, 26-28 (1992); MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 322 (2007); Sitaraman & Wuerth, *supra* note 96, at 1925. But see Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 944-45, 948 (2004) (defending the use of the doctrine in the foreign affairs area).

183. See *supra* text accompanying notes 91-93.

184. See *supra* text accompanying note 92.

185. See *supra* text accompanying note 93.

186. See *supra* Part II.B.

relating to international law and international relations—a point of continuity missed by most writers on the subject.¹⁸⁷

Fourth, the doctrine as applied in the lower courts is more prudential than is suggested by the Supreme Court decisions. Unlike the Supreme Court, the lower courts often rely on the prudential factors listed in *Baker*. To the extent that the Supreme Court has signaled disapproval of a prudential version of the doctrine, such as in *Zivotofsky*, that signal has been largely ignored by the lower courts, especially in the foreign affairs area. Suggestions that decisions like *Zivotofsky* normalized foreign relations law adjudication by reducing justiciability barriers¹⁸⁸ are contradicted by the lower court practice.¹⁸⁹ For better or worse, the lower court practice is consistent with the broad

187. See Edwin D. Dickinson, Editorial Comment, *International Political Questions in the National Courts*, 19 AM. J. INT'L L. 157, 158 (1925) (providing examples of how “[m]any, if not most, of the international questions which arise in litigation are regarded as political in nature and hence not within the competence of the judicial department at all”); cf. Grove, *supra* note 67, at 1911 (contending that the political question doctrine of the nineteenth century was “strikingly different from the current version”); Sitaraman & Wuerth, *supra* note 96, at 1911-14 (drawing a sharp distinction between the “orthodox” approach to the political question doctrine, which was allegedly “severely circumscribed,” and the “far more expansive” modern doctrine). Jack Goldsmith has suggested that the pre-*Baker* political question cases relating to foreign affairs were substantially different from modern political question decisions because they were “categorical” in nature rather than based on case-by-case assessments of the impact of the dispute on foreign affairs. See Goldsmith, *supra* note 7, at 1400-01. We are skeptical that this distinction is as sharp as he suggests, for two reasons. First, the pre-*Baker* decisions relied on functional considerations to determine the categories—considerations that the Court in *Baker* recited in its six-factor test. See Louis L. Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1304 (1961) (observing, before *Baker*, that whether a question is deemed political is not based on subject matter but rather on whether there are “no well-developed principles, or the issue is felt to be so closely related to a complex of decisions not within the court’s jurisdiction that its resolution by the court would either be poor in itself or would jeopardize sound decisions in the larger complex”). Second, the post-*Baker* decisions, once they become precedent, also establish categories. Cf. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1306 (2006) (“A holding that a category of cases is nonjusticiable in effect creates a judicially manageable standard, mandating dismissal, to guide future decisionmaking.”).

188. See Sitaraman & Wuerth, *supra* note 96, at 1927; cf. JARED P. COLE, CONG. RSCH. SERV., R43834, THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS 22 (2014) (“The majority opinion in *Zivotofsky* appears to have limited the scope of cases that may pose a political question; but the remaining contours of the doctrine are unclear.”).

189. See Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from “Exceptionalism,”* 128 HARV. L. REV. F. 294, 298 (2015) (noting that “[o]ne may see much less ‘normalization’ during the period in question by looking at the lower courts or political branch practice”); Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring Zivotofsky I’s Political Question Analysis?*, LAWFARE (May 19, 2016, 4:23 PM), <https://perma.cc/2NUE-2BK9>.

prudential account of the political question doctrine advanced by scholars like Finkelstein and Bickel, and this has been true throughout the past sixty years since *Baker*.¹⁹⁰

Indeed, the doctrine is even more prudential than our coding of the *Baker* factors might suggest. In practice, *all* of the *Baker* factors have a prudential character. This is true even of the first factor—“a textually demonstrable constitutional commitment of the issue to a coordinate political department”—given that the Constitution almost never expressly disallows judicial review over an exercise of governmental authority. In *Nixon v. United States*, for example, the Supreme Court invoked the first *Baker* factor even though the text of the Constitution did not clearly give the Senate exclusive authority to decide the trial procedures to be used for impeachments.¹⁹¹ The Constitution refers to the Senate’s sole power “to try” impeachments, not a sole power to determine what a trial is.¹⁹² In concluding that the Constitution nevertheless gave the Senate exclusive authority over this issue, the Court relied in part on prudential reasoning, observing: “We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would ‘expose the political life of the country to months, or perhaps years, of chaos.’”¹⁹³

190. Perhaps not surprisingly, the executive branch continues to rely on the prudential *Baker* factors. For a recent example, see *Gutrejman v. United States*, 596 F. Supp. 3d 1, 2, 9 (D.D.C. 2022) (noting that the government was invoking the first, second, fourth, and sixth factors in arguing for dismissal of a suit seeking judicial enforcement of an international agreement), *appeal docketed*, No. 22-5159 (D.C. Cir. June 7, 2022).

191. See 506 U.S. 224, 228-29 (1993).

192. See U.S. CONST. art. I, § 3, cl. 6.

193. *Nixon*, 506 U.S. at 236 (quoting 938 F.2d 239, 246 (D.C. Cir. 1991)); *cf. id.* at 240 (White, J., concurring in the judgment) (noting that “there are few, if any, explicit and unequivocal instances in the Constitution” of a disallowance of judicial review over an exercise of governmental authority); *id.* at 253 (Souter, J., concurring in the judgment) (“As the Court observes, judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government.” (citation omitted)). For a defense of treating issues relating to impeachment as nonjusticiable, see generally Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231 (1994). Sometimes prudential considerations will weigh in favor of exercising judicial review rather than abstaining. In *Powell v. McCormack*, 395 U.S. 486, 547-49 (1969), for example, the Court reviewed the House of Representatives’ effort to exclude an elected member from taking his seat. If this action were not subject to review, it could potentially mean that a political party that controlled the House could exclude elected members from the other party on purely political grounds, something that could trigger a constitutional crisis. Such a scenario is less likely for a conviction of impeachment, as in *Nixon*, which requires a supermajority vote. See U.S. CONST. art. I, § 3, cl. 6. For an argument that prudential considerations weighed in favor of judicial review in *Bush v. Gore*, see RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 162-63 (2001).

This observation about the first *Baker* factor also helps explain why, when courts do rely on this factor, they (as was evident in our Table 4) often rely on other factors as well. That might seem curious, since the first *Baker* factor should be sufficient by itself to support application of the doctrine. However, as illustrated by some of the decisions discussed in Part II.B, even when they find that the first factor is satisfied, courts are often uncertain about the extent to which it actually supports dismissal. The implications of the relevant constitutional text are often unclear, and, in fact, usually there is no specific, relevant constitutional text so the court instead must rely on inferences and historical practice. Indeed, often the only evidence that courts cite to support application of the first factor is just a general list of constitutional provisions that happen to relate to foreign affairs.¹⁹⁴ Understandably, courts in those situations supplement their analysis by reference to other factors.

Fifth, contrary to the assumptions of the “judicial abdication” critique, the political question doctrine does not permanently foreclose judicial consideration of an issue. Rather, it merely disallows consideration in the absence of clearer legal guidance, which Congress (or sometimes other institutions) can provide if it so chooses. This is obviously true in statutory or common law cases, given Congress’s authority to amend the relevant statute or override the common law. In numerous lower court decisions, the political question doctrine operates as a gap-filler that promotes federal policies but is subject to congressional override.¹⁹⁵

Once one recognizes this feature of the lower court decisions, a much more fundamental point emerges about the political question doctrine: It is subconstitutional in its effect. That is, it does not typically bar Congress from authorizing judicial review. Most political questions are political only unless and until there is clearer legal guidance, typically from a statute. This is true *even when the doctrine is applied in cases involving constitutional claims*. Consistent with this idea, the Supreme Court has indicated that it is generally inappropriate to apply the political question doctrine when the constitutionality of a statute is at issue.¹⁹⁶ In *Zivotofsky v. Clinton*, for example, if there had been no statute on

194. See, e.g., *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938, 950 (5th Cir. 2011); *Schneider v. Kissinger*, 412 F.3d 190, 194-95 (D.C. Cir. 2005).

195. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823, 827 (D.C. Cir. 1984) (Robb, J., concurring in the judgment) (arguing for the application of the political question doctrine in a case involving the international law liability of a non-state entity for terrorism abroad, but noting that, if the political branches “decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed”).

196. See *Zivotofsky v. Clinton*, 566 U.S. 189, 196-97 (2012); *INS v. Chadha*, 462 U.S. 919, 941-42 (1983). This does not mean the political question doctrine has no application to statutory claims; indeed, a majority of the cases in our sample of cases involved statutory claims. The application of a statute can be sufficiently unclear that, when

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point, it may well have been proper to declare a challenge to the President's position on the status of Jerusalem to be a political question. But the Court said that this was no longer true in light of the existence of a statutory provision.¹⁹⁷ The subconstitutional effect of the political question doctrine is also evident in *Rucho v. Common Cause*. There, the Supreme Court emphasized at the end of its opinion that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause," and it suggested that Congress could create specific (and presumably legally enforceable) rules on the subject.¹⁹⁸

The other two post-*Baker* applications of the political question doctrine by the Supreme Court also fit this model. In *Nixon v. United States*, although the Court declined to resolve whether a procedure used by the Senate for an impeachment was constitutional, it is possible that judicial review would be allowed if Congress (or the House or Senate) adopted rules governing the impeachment trial process and there was an allegation that these rules had been violated. Indeed, the Court emphasized that "courts possess power to review either legislative or executive action that transgresses identifiable textual limits."¹⁹⁹ And, in the controversy that led to *Gilligan v. Morgan*, which

combined with other considerations, it may be viewed as presenting a political question. See, e.g., *Smith v. Obama*, 217 F. Supp. 3d 283, 299 (D.D.C. 2016) ("The questions posed in this case go significantly beyond interpreting statutes and determining whether they are constitutional. Plaintiff asks the Court to second-guess the Executive's application of these statutes to specific facts on the ground in an ongoing combat mission halfway around the world."), vacated as moot sub nom. *Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018) (per curiam).

197. See *Zivotofsky*, 566 U.S. at 196 (reasoning that, in light of the existence of the statute, "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be").
198. See 139 S. Ct. 2484, 2508 (2019). This is not to suggest that the Constitution is irrelevant to the doctrine's application. In some applications of the doctrine, the Constitution is viewed as mandating that the courts stay their hand until clearer guidance is provided. In those instances, the doctrine is operating somewhat like the Dormant Commerce Clause—that is, based on the Constitution, but subject to political branch override. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423-25 (1946). In other applications, however, the doctrine seems more discretionary and is based on federal policies, including sometimes policies derived from constitutional structure rather than constitutional commands. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (noting that, although the text of the Constitution "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state," the act of state doctrine "does, however, have 'constitutional' underpinnings").
199. *Nixon v. United States*, 506 U.S. 224, 238 (1993). In *Nixon*, the Senate was acting in accordance with its internal impeachment rules, which had previously been adopted by Senate resolution. See *id.* at 226-27; RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS R. XI, in COMM. ON RULES & ADMIN., U.S. SENATE, S. DOC. NO. 117-1, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE 217 (2022).

concerned the shootings by the Ohio National Guard at Kent State University, judicial review *was* allowed over damages claims relating to the shootings pursuant to 42 U.S.C. § 1983,²⁰⁰ just not over the claims for equitable relief.²⁰¹ The Court in *Gilligan* emphasized that “we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.”²⁰² Again, the Court was not foreclosing all possibility of judicial review, especially when the claims are authorized by Congress.

Further confirmation of this point comes from an examination of the ways in which the Supreme Court applied the political question doctrine before *Baker*. Consider, for example, foreign sovereign immunity. As noted above, starting in the late 1930s, courts (including the Supreme Court) began giving absolute deference to the executive branch about whether to accord foreign sovereigns immunity in U.S. courts.²⁰³ The Court in *Baker v. Carr* cited to some of these decisions as examples of the political question doctrine.²⁰⁴ Yet in 1976, Congress authorized independent judicial determinations of sovereign immunity, in the Foreign Sovereign Immunities Act,²⁰⁵ and courts have since adjudicated numerous sovereign immunity disputes.²⁰⁶ The act of state doctrine, which historically overlapped with the political question doctrine, works the same way. Under this doctrine, courts presume the validity of the acts of foreign governments taken within their territories and do not subject them to judicial evaluation.²⁰⁷ Yet it is assumed that Congress can override the doctrine and, indeed, Congress immediately overturned the holding in the Court’s seminal act-of-state decision, *Banco Nacional de Cuba v. Sabbatino*.²⁰⁸

200. See *Scheuer v. Rhodes*, 416 U.S. 232, 233-34, 248-49 (1974).

201. See *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (“It is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State.”).

202. *Id.* at 11-12.

203. See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 588-89 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74-75 (1938).

204. See 369 U.S. 186, 210-13 (1962).

205. See 28 U.S.C. §§ 1602-1611.

206. See BRADLEY, DEEKS & GOLDSMITH, *supra* note 101, at 484-506 (describing various types of cases that courts have adjudicated under the Foreign Sovereign Immunities Act).

207. See, e.g., *W.S. Kirkpatrick & Co. v. Env’t Tectonics Corp., Int’l*, 493 U.S. 400, 409 (1990) (noting that the doctrine “requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid”).

208. 376 U.S. 398, 400-01, 435-39 (1964); see 22 U.S.C. § 2370(e)(2). While the Supreme Court in *Marbury* indicated that certain political questions could never be considered by the courts, it was referring to questions concerning “how the executive, or executive
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Our taxonomy of lower court cases in Part II.B further confirms this point. In these cases, the political question doctrine was often used as a gap-filler or avoidance tool when other doctrines—relating to immunity, for example—were unclear or incomplete. Congress has substantial ability to clarify the law on these questions and thus to displace the political question doctrine. Even on sensitive separation-of-powers matters, Congress can attempt to set forth its view of the law with clarity and thereby push the courts to address the merits (which might or might not favor Congress).

Scholars have missed these features of the political question doctrine—what we are calling the “real” political question doctrine—because of their focus on the Supreme Court.²⁰⁹ With these features in mind, we now offer a theory of the functions that the doctrine serves.

B. The Political Question Doctrine and Judicial Capacity

Our theory is that in situations in which the political question doctrine is not a sub rosa ruling on the merits, it is a screening device relating to judicial capacity, with capacity encompassing both matters of competence—such as a court’s ability to gather facts, interpret the law, and predict the consequences of its decisions—as well as the court’s political standing or legitimacy. Under this view, when the government takes an action that is not clearly authorized or blocked by a statutory or constitutional rule, a court should determine whether it is an appropriate forum for resolving the dispute relative to that of the political branches.²¹⁰ If the court decides that it is a proper forum, it should resolve the case on the merits—asserting its own interpretation of the law and making clear that the government has acted lawfully or unlawfully. If the court decides that it is not a proper forum, it should abstain from deciding the

officers, perform duties in which they have a discretion.” *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Our claim about the subconstitutional effect of the political question doctrine is different than the observation made by Richard Fallon about how political question rulings are “less categorical commitments to judicial nonintervention” than is commonly assumed. Fallon, *supra* note 4, at 1485. His point was simply that the courts may construe a political question ruling as applying only to particular assertions of authority and not others. *See id.* at 1535. We have no quarrel with his observation, but our claim is much broader: that most political question rulings are less categorical than is commonly assumed, even with respect to a particular assertion of authority, because they are subject to override by Congress.

209. By using the word “real,” we mean something like what Finkelstein meant in referring to a “realistic view of the law.” *See supra* text accompanying note 44.

210. We refer here to challenges to government actions. As discussed in Part II.B, these challenges might be indirect—for example, in a suit challenging the actions of a military contractor or a private company engaging in actions that are parallel with those of the U.S. government.

issue, allowing the government to act but not making its own claim about the meaning of the law.

1. Three steps

At the risk of oversimplifying, one can think of this theory of what courts are doing as embodying a three-step test. Step 1 involves determining whether the statute or constitutional norm is clear or not. If the law clearly bars (or permits) the government action, the court stops there and rules for the challenger (or government). If the law is ambiguous, the court determines in Step 2 whether the court is the proper forum for resolving the ambiguity. Here, the court engages in an institutional analysis, evaluating the relative institutional capacity of the court and the political actor in question. If the court determines that it is not the appropriate forum, it rules in favor of the government on political question grounds. If the court determines that it is the appropriate forum, it moves on to Step 3 and resolves the ambiguity in the law using the relevant interpretive tools, including considerations of institutional capacity that it also used in Step 2. We emphasize that these steps are conceptual, not doctrinal; in practice, courts do not mechanically work through steps like this as they do, for example, under the *Chevron* deference doctrine. In fact, in most contexts, courts presume for purposes of what we are calling Step 2 that they are the proper forum. But in some contexts, most notably foreign affairs, they do not make this presumption.²¹¹

It is easy to see how the Supreme Court's political question cases fit this pattern. *Baker v. Carr* and *Rucho v. Common Cause* both involved challenges to state redistricting maps. In both cases, no clear constitutional standard governed the controversy under Step 1, so the Court moved to Step 2. In *Rucho*, the Court was concerned about wading "into one of the most intensely partisan aspects of American political life" without having an easy-to-administer standard for determining when gerrymandering was excessive.²¹² Because a clear standard could not be derived from text, policy, or academic theory, a court that tried to evaluate a gerrymandered district would be vulnerable to the accusation that it was playing politics, and could not defend itself by pointing out that its hands were tied by a determinate legal rule. *Baker* involved an equally politically sensitive area of American life, but, according to the Court, a determinate standard suggested itself—namely, one based on the

211. For an especially strong statement by the Supreme Court along these lines, see *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). For a recent endorsement of this statement, see *Egbert v. Boule*, 142 S. Ct. 1793, 1804-05 (2022).

212. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

Equal Protection Clause.²¹³ The Court thus held that the lower court erred by abstaining and remanded for consideration of the merits under Step 3.²¹⁴ The dissents in both cases accepted these principles but disputed the majorities' factual claims—with the *Rucho* dissent arguing that a determinate standard could be derived from statistical analysis, and the *Baker* dissent arguing that equal protection doctrine did not provide a determinate standard for evaluating methods of apportionment.²¹⁵

This doctrinal framework mixes two genres of legal analysis—interpretation and abstention. The court engages in interpretation at all three steps, but in Step 2 it engages in the sort of institutional analysis that courts use when they consider whether to abstain from adjudication under doctrines such as *forum non conveniens* and international comity.²¹⁶ This mixing of genres has contributed to some of the confusion about the doctrine. To the extent that the court interprets, it is just ruling on the merits, and there is no need for a separate doctrine.²¹⁷ The doctrine's distinctive contribution is its requirement, at Step 2, that the court in some instances should refrain from deciding the dispute on the merits.

A possible response is that, as a practical matter, refusing to rule on the merits based on the political question doctrine has the same effect as ruling on the merits in favor of the government. If courts dismiss challenges to government action on political question grounds, then the challengers lose, just as they lose if the courts find a constitutional or statutory basis for government immunity. And as these rulings accumulate, they harden into

213. See *Baker v. Carr*, 369 U.S. 186, 226 (1962); see also *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (interpreting the Equal Protection Clause as “demand[ing] no less than substantially equal state legislative representation for all citizens, of all places as well as of all races”).

214. *Baker*, 369 U.S. at 226, 237.

215. See *Rucho*, 139 S. Ct. at 2509, 2516-18 (Kagan, J., dissenting); *Baker*, 369 U.S. at 268-69 (Frankfurter, J., dissenting).

216. See, e.g., *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (“Dismissal for *forum non conveniens* reflects a court’s assessment of a ‘range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.’” (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (citations omitted))); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (“Applied prospectively, federal courts [invoking international comity] evaluate several factors, including the strength of the United States’ interest in using a foreign forum, the strength of the foreign governments’ interests, and the adequacy of the alternative forum.”).

217. It is common for the courts to rely on assumptions of institutional capacity to interpret substantive law. Antitrust law, for example, bears the imprint of continuous efforts by the Supreme Court to formulate the law so as to minimize the need for courts to make complex economic and empirical judgments that might lead to error. See, e.g., Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. PA. J. BUS. L. 293, 294-95 (2022).

precedent, and in a sense, they harden into law: Future courts that cite precedent as a basis for dismissing the challenge are not engaging in the political question inquiry. The difference seems merely rhetorical, as when courts announce that unpublished opinions do not establish precedent but then those opinions are used and cited as precedent anyway.

We sympathize with this view, but the political question doctrine does play a role that has real-world consequences. Where the courts do not offer an interpretation of the relevant law, other government actors—executive branch lawyers, Congress, states—can assert their own interpretations, which they will presumably follow.²¹⁸ Both formal judicial abstention and a general tendency of courts to move gingerly in separation-of-powers disputes has allowed the executive and Congress to debate constitutional authority relating to sensitive issues such as executive privilege and war powers, and to reach accommodations that keep the peace between the branches, more or less.²¹⁹ At least in principle, the executive can abandon an earlier interpretation of the law and advance a new interpretation when a court has abstained from adopting the earlier interpretation but not when a court had endorsed that interpretation as law.

This three-step theory is straightforward and rooted in American judicial history. In determining that courts are empowered to review government actions for their constitutionality, the Supreme Court in *Marbury v. Madison* necessarily had to delineate the scope of the review; otherwise, the courts would usurp the powers of the political branches. The Court therefore highlighted the importance of avoiding “political” matters—that is, matters that the Constitution places with the executive or legislative branch.²²⁰ As it became clear that legal norms are not self-interpreting, courts in exercising judicial review were required to draw a line between law and politics. By the time of *Baker v. Carr*, that practice could be summarized as one in which the Court followed the text of the Constitution and statutes when it could, and

218. Cf. WRIGHT, MILLER & COOPER, *supra* note 158, § 3534, at 672 (noting that the political question doctrine allows courts to “avoid[] judicial validation of questionable action that might entrench it against renewed political consideration and challenge, and even help generate like actions in the future”); Fallon, *supra* note 4, at 1533 (“[A] ruling that a question is nonjusticiable may achieve different expressive effects from a decision that rejects a constitutional challenge on the merits.”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978) (“When institutional concerns result in the invocation of the political question doctrine, we understand the constitutional norm at issue to retain its legal validity.”).

219. See, e.g., *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020) (“Historically, disputes over congressional demands for presidential documents have not ended up in court.”).

220. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177-78 (1803) (“Questions, in their nature political . . . can never be made in this court.”).

otherwise relied on prudential factors to determine the Court's relative capacity to resolve ambiguities in the law.

2. Similar doctrines

There are a variety of other judicial abstention doctrines that serve the same function as the political question doctrine. For example, there is a doctrine of consular nonreviewability, which holds that “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”²²¹ More generally, there is a “plenary power” doctrine in immigration law that sharply limits constitutional challenges to the government's immigration decisions.²²² There is also a doctrine of non-inquiry pursuant to which courts, when considering a challenge to the government's extradition or other transfer of a person in custody to another country, will not ordinarily consider whether the person is likely to be mistreated by the other country.²²³ And there is a general presumption against judicial review of acts of non-enforcement by administrative agencies.²²⁴ The justifications for these doctrines are similar if not identical to those in support of the political question doctrine.

In addition, there are other doctrines that, like the political question doctrine, require courts to resolve disputes in part by looking at their own institutional capacity. The theory behind the *Chevron* deference doctrine, for example, assumes that when a statute that is administered by an agency is ambiguous, Congress delegates interpretative authority to the regulator and does so because the regulator has more expertise with respect to the statute

221. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see also, e.g.*, *Baan Rao Thai Rest. v. Pompeo*, 985 F.3d 1020, 1024 (D.C. Cir. 2021) (“Consular nonreviewability shields a consular official’s decision to issue or withhold a visa from judicial review, at least unless Congress says otherwise.”).

222. *See* David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31 (2015).

223. *See* *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (“The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.”); *see also, e.g.*, *United States v. Lui Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) (“The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers.”).

224. *See* *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining “the general unsuitability for judicial review of agency decisions to refuse enforcement”); *see also, e.g.*, *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 882 (D.C. Cir. 2021) (“In our system of separated powers, an agency’s decision not to enforce the law is an exercise of executive discretion and therefore generally unreviewable by the courts.”).

than courts do.²²⁵ The regulator derives that expertise from its institutional position: It is an experienced specialist while the courts are generalists, called upon to interpret the statute only on occasion. One could imagine a version of *Chevron* where the courts abstained from interpreting a statute rather than adopting the (reasonable) interpretation of the regulator as law. Indeed, one could alternatively think of the *Chevron* doctrine as having an additional step, where the court stops if it determines that it is not the appropriate forum for interpreting the law.²²⁶ This modified version of the *Chevron* doctrine would in fact be the political question doctrine as we understand it; it is just that the intermediate step is skipped in routine regulatory disputes because it is understood that the court should endorse the regulator's interpretation rather than refrain from resolving the dispute.

The political question doctrine can also be understood as a version of the canonical *Youngstown* doctrine. In his famous concurrence, Justice Jackson argued that courts should block executive-branch actions when they clearly violate legal norms established by Congress or the Constitution. But in the “zone of twilight,” where the president and Congress have concurrent authority:

[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.²²⁷

While Jackson did not explicitly call on courts to refrain from exercising review in the zone of twilight, he implied just that—that the actual test of power depends not on the law, the domain of courts, but on events and imponderables, which call for political judgment.

Application of the political question doctrine can further be seen as a form of judicial minimalism, pursuant to which courts aim for narrow rulings when possible.²²⁸ Because the doctrine involves not taking a position unless and until

225. See Bradley, *supra* note 108, at 670-71. We are discussing the *Chevron* doctrine here only by analogy and do not intend to take a position on its current vitality. For discussion of the history and current status of the doctrine, see generally THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* (2022).

226. Cf. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190-91 (2006) (discussing the initial “step zero” in the *Chevron* deference analysis, in addition to the traditional two steps); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760 (2017) (arguing that the D.C. Circuit had been applying another step, relating to whether the agency had recognized the statutory provision to be ambiguous).

227. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring).

228. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10-14* (2001) (describing judicial minimalism).

the legal materials become clearer, it restricts the realm of judicial influence. And, because the constitutional cases in which the political question doctrine is relevant are likely to be situations in which substantial governmental practice has accumulated, use of the political question doctrine can be seen as a way of deferring to that practice.²²⁹

Many other doctrines, including those governing standing, ripeness, mootness, comity, *forum non conveniens*, and equitable discretion enable courts to refrain from taking a position on legal questions. These doctrines are based on the assumption that courts should not interpret the law, or even correct misinterpretations of the law, until a dispute is properly before them, facts have been developed, arguments have been marshaled, and experience has been accumulated.²³⁰ The political question doctrine is of a piece. The judiciary must have the ability to make these screening decisions.²³¹ Otherwise, it would be constantly issuing opinions on every corner of the law—with judges acting as if they were treatise writers. No one seems to want that, an approach that would likely produce many ill-considered decisions and prevent useful legal development and evolution. Relatedly, despite recurring debates on the Supreme Court about the extent to which prudential considerations should inform the judiciary’s exercise of its jurisdiction, such considerations are commonplace in the rules and doctrines governing the federal courts.²³² The

229. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 429-30 (2012); cf. *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) (“We have not previously interpreted the [Recess Appointments] Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”).

230. For examples of this sentiment, see *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (“At present, this case is riddled with contingencies and speculation that impede judicial review.”); *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (“In the light of this overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to ‘settle’ it for the sake of convenience and efficiency.” (footnote omitted)); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (“[W]e have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief.”); and *Younger v. Harris*, 401 U.S. 37, 52-53 (1971) (“[E]ven when suits of this kind involve a ‘case or controversy’ sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary.”).

231. Cf. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (“[S]uggestions of an overriding obligation, subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction.”).

232. See BREST ET AL., *supra* note 18, at 58 (discussing the prevalence of prudential reasoning in how U.S. courts have exercised judicial review); Curtis A. Bradley & Ernest A. *footnote continued on next page*

key point is that the functions served by the political question doctrine are in many ways standard features of American law.

3. Foreign affairs

While the political question doctrine formally applies to any dispute in which the appropriateness of the court as a judicial forum is in question, political question cases are often foreign relations cases. It is in the area of foreign relations where courts are at their maximal disadvantage. To be sure, there has long been debate about the extent to which foreign affairs cases should be treated differently from those involving domestic matters, and of course sometimes the line between foreign and domestic is itself uncertain. But it is still possible to make some rough generalizations, consistent with our theory, about why foreign affairs cases are more likely to trigger the political question doctrine.

First, the Constitution puts very few constraints on the conduct of foreign relations, and, with important exceptions, Congress does not regulate the executive's conduct in foreign relations as much as it does in the domestic arena. Indeed, when it does act, it is much more common for Congress to delegate broad discretion to the executive branch in foreign affairs.²³³ Thus, there are many cases where no clear textual standard can be applied.²³⁴

Second, although the handful of relevant constitutional provisions and historical practice are mostly ambiguous, they tend to give the executive an independent source of constitutional authority. The executive, in turn, can and does invoke this authority as a ground for disregarding congressional constraints (or as a basis for interpreting them away), creating serious political

Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 23 (2021) (noting that “prudential doctrines limiting the powers of the federal courts pervade the field of federal jurisdiction”); *see also, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (referring to “prudential dimensions of the standing doctrine” that are “matters of judicial self-governance” (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))), *abrogated by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (noting that the ripeness doctrine is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction”); *Honig v. Doe*, 484 U.S. 305, 330-31 (1988) (Rehnquist, C.J., concurring) (concluding that many aspects of the mootness doctrine are likewise prudential). *But cf. Lexmark Int'l*, 572 U.S. at 125-28 (questioning the idea of prudential limitations on standing).

233. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 124 (2d ed. 1996) (noting that “from the beginning, reluctant Congresses have felt compelled to delegate to Presidents the largest discretion, with minimal guidelines, to carry out the most general legislative policy”).

234. *Cf. Jaffe, supra* note 187, at 1303 (“Many of the questions that arise [in foreign affairs] are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules.”).

and practical difficulties for courts that are asked to constrain the executive based on statutes.²³⁵

Third, courts have less information and expertise with respect to foreign relations issues than the executive does, making it hard for them to be confident that they are making the right decision. The Supreme Court has recognized this point about comparative institutional competence in a wide array of contexts, ranging from treaty interpretation, to immigration enforcement, to the extraterritorial application of federal statutes.²³⁶ Notably, in limiting human rights suits brought under the Alien Tort Statute in recent years, the Court has emphasized “the danger of unwarranted judicial interference in the conduct of foreign policy.”²³⁷

Fourth, courts face logistical challenges in evaluating evidence and hearing testimony relating to foreign affairs actions, and in monitoring compliance with their decisions, especially with respect to actions taken abroad. In part for that reason, the Supreme Court has been reluctant to extend constitutional protections abroad, especially in connection with law enforcement or military actions by the U.S. government.²³⁸

Fifth, judicial involvement in foreign relations may send mixed messages to foreign sovereigns, disrupt diplomacy, and reduce U.S. leverage—as the Supreme Court has repeatedly recognized.²³⁹ Indeed, these generic concerns

235. For a recent example in which the executive branch claimed authority to disregard a statute (relating to treaty termination), see *Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty*, 44 Op. O.L.C., slip op. at 10 (Sept. 22, 2020), <https://perma.cc/ASN4-EMH8>.

236. *See, e.g.*, *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (treaty interpretation); *Jama v. Immigr. & Customs Enft*, 543 U.S. 335, 348 (2005) (immigration enforcement); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124 (2013) (extraterritorial application of federal statutes).

237. *Kiobel*, 569 U.S. at 112, 116, 124.

238. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (“The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.”); *cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (“If there are to be restrictions on searches and seizures which occur incident to . . . American action [halfway around the globe], they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.”); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (“Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”).

239. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020) (“To avoid upsetting the delicate web of international relations, we typically presume that even congressionally crafted causes of action do not apply outside our borders.”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-33 (1964) (justifying the act of state doctrine in part on the need to avoid undermining the executive branch’s diplomacy and negotiations with other countries).

about judicial involvement in foreign relations help explain a range of doctrines that keep courts out of foreign relations cases, including the political question doctrine.²⁴⁰

While many scholars may disagree that courts should show such hesitancy to intervene in cases implicating foreign relations, our point here is merely that this hesitancy is both routine and consistent with the account of the political question doctrine that we advance in this Article. To be sure, as the Court in *Baker* observed, not *all* cases touching on foreign relations have these characteristics.²⁴¹ Not surprisingly, therefore, the political question doctrine is not inevitably applied in foreign affairs cases, especially when the legal materials are relatively clear.²⁴² But these features help explain why applications of the doctrine are especially common in foreign affairs disputes.

C. Disparity Between the Supreme Court and the Lower Courts

As to why lower courts use the political question doctrine more frequently than the Supreme Court, commentators who have noticed the difference have suggested that it may be attributable to the fact that the Supreme Court has discretion over which cases it takes, whereas the lower courts do not.²⁴³ Under this theory, the Supreme Court does not need the political question doctrine as much because it can screen out politically sensitive cases by rebuffing petitions for certiorari.

240. See Bradley, *supra* note 108, at 659-60; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1173 (2007).

241. *Baker v. Carr*, 369 U.S. 186, 211 (1962). In *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 225, 229 (1986), for example, the Court declined to apply the political question doctrine to a challenge to the executive's exercise of discretion under a statute relating to international sanctions. The Court noted that, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. The Court instead applied the *Chevron* deference doctrine and held in favor of the executive on the merits. *Id.* at 240-41.

242. See, e.g., *Al-Tamimi v. Adelson*, 916 F.3d 1, 11-12, 14 (D.C. Cir. 2019) (declining to dismiss a genocide claim against Israeli settlers under the political question doctrine because "it is well settled that genocide violates the law of nations" and Congress in the Alien Tort Statute "incorporate[ed] the law of nations"); *Lane v. Halliburton*, 529 F.3d 548, 562-63 (5th Cir. 2008) (declining to apply political question doctrine to suits against government contractors that "primarily raise legal questions that may be resolved by the application of traditional tort standards").

243. See *supra* text accompanying note 39; see also Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 887 (2022) (noting that "[l]ower courts may have some discretion to control what they decide[] through devices like abstention doctrines and 'prudential' standing'" but arguing that "this discretion (to the extent it exists at all) is different in kind from certiorari").

This explanation contains some truth but is incomplete. If the Supreme Court wants the lower courts to apply the political question doctrine properly, it must continue to provide guidance by taking political question cases and resolving them. Moreover, the Supreme Court's ability to deny certiorari is not an effective screening tool when a lower court *declines* to apply the political question doctrine in a sensitive case, because the Court (or at least four justices, which is all that is needed to grant cert) may feel compelled to avoid leaving the lower court decision in place. Imagine that in the Vietnam War cases (discussed above in Parts I.B and II.B), one of the circuit courts had held against the executive. The Supreme Court would not realistically have been able to deny cert in that situation. It was only able to do so in the Vietnam cases because the lower courts dismissed cases based on the political question doctrine or on the merits.

A more complete explanation flows from our understanding of the doctrine: The Supreme Court is a more "political" body than the lower courts are. We mean this in a technical rather than ideological sense. The lower courts interpret and enforce the laws, including the precedents handed down by the Supreme Court.²⁴⁴ When those sources of law are not clear, the lower courts can rely only with difficulty on traditional methods of legal analysis, and therefore may best preserve their authority and avoid error by abstaining rather than trying to develop the law where political backlash is a risk. The political question doctrine provides formal authority for such abstention.

By contrast, the Supreme Court possesses more political authority: It is permitted to overturn its own precedents (as we were reminded again recently in the abortion context) and to rely on broader constitutional policy considerations to formulate the law, and it is expected to develop the law where it is unclear. It benefits from greater resources, higher quality litigation including the involvement of countless amici, and the ability to wait for numerous lower courts to pass on an issue. In part for these reasons, the justices have a confident view of their abilities. As Chief Justice Roberts wryly observed in *Rucho*, "[n]o one can accuse this Court of having a crabbed view of the reach of its competence."²⁴⁵ It is unlikely that he would say the same about any lower court. But the Supreme Court's competence is more a function of its

244. This is not to deny that the lower courts exercise some discretion in applying Supreme Court precedents. Indeed, what we have shown with respect to the political question doctrine is an example of such discretion. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 388 (2007) ("Despite the demand of hierarchical precedent, lower federal courts retain a substantial amount of discretion when deciding cases."); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 924 (2016) ("[N]arrowing [of Supreme Court precedent] from below happens all the time, sometimes with the Supreme Court's blessing." (footnote omitted)).

245. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

political and constitutional power than its resources. As Justice Robert Jackson quipped, “We are not final because we are infallible, but we are infallible only because we are final.”²⁴⁶ The justices, unlike lower court judges, are well-known, enjoy the backing of powerful elected officials, and derive whatever credibility that comes from surviving media attention and a politically important public confirmation hearing. Few justices harbor ambitions for a post-judicial career that unpopular opinions might thwart, while lower court judges may hope for elevation. As custodians of a court of last resort, justices may also be less willing to signal limits on their own authority than the lower court judges are.²⁴⁷ They also, unlike lower court judges, do not fear the humiliation of reversal.

This creates a paradoxical situation. If the Supreme Court frequently reviewed political question cases, and invariably ruled on the merits, it would give the lower courts the impression that the political question doctrine is a dead letter. But if the Supreme Court instead frequently used the political question doctrine to avoid ruling on the merits, it would lose opportunities to resolve disputes of major importance. The Court may want to retain the ability to resolve a class of sensitive merits issues that the lower courts should abstain from deciding or attempting to decide. If that is the case, the Court needs to make clear that there are different rules, one for the Supreme Court and one for the lower courts.

That seems to be what has happened. An equilibrium or implicit understanding has arisen in the practice of the Supreme Court and the lower courts. Possessing political or quasi-political authority, the Supreme Court makes law by creating, modifying, and overturning precedents. Lacking such authority, the lower courts try to avoid making law, except perhaps interstitially, and the political question doctrine is one tool for avoiding decisions in cases where a ruling on the merits one way or the other would make law to a larger extent than lower courts are generally responsible for. Where the Supreme Court is not ready to make law, it, unlike the lower courts, can deny certiorari. It is only when the Court thinks that the lower courts are excessively cautious that one can expect it to intervene by granting

246. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

247. *Cf.* Fallon, *supra* note 4, at 1488 (“The justices dislike acknowledging that some of their decisions, were they to make them, would be *ultra vires* and thus of questionable legal authority.”); *id.* at 1526 (“[T]he Supreme Court hesitates to mark issues as outside its jurisdiction because of a belief among the justices that the Court’s availability to resolve constitutional disputes is crucial to the successful operation of the American constitutional order.”). In the text, we indulge in what seems to us to be reasonable speculation. The literature on the Supreme Court’s legitimacy generally does not compare it to that of the lower courts. *See, e.g.*, James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 202 n.3, 204-05 (2014).

certiorari and reversing, as in *Zivotofsky*.²⁴⁸ And, as we have noted, the Court may apply the political question doctrine when the lower courts have declined to apply it, as in *Rucho*.²⁴⁹

There are several ways in which this equilibrium could have emerged. The decision to apply the political question doctrine depends in part on prudential factors. What is prudent for the Supreme Court may not be prudent for a lower court. For example, rejection of a foreign policy determination by the executive may demonstrate “lack of respect” under factor four of the *Baker* test if coming from a lower court but not if coming from the Supreme Court, as the justices are closer in rank and political authority to the president than lower court judges are. And if, as we argue, the Supreme Court has political authority that the lower courts lack, then the Supreme Court is in a better position to make a “policy determination” under factor three of the *Baker* test than the lower courts are. The notion that the political question doctrine operates differently at different levels of the judiciary can also be understood through a jurisdictional lens. The Supreme Court’s jurisdiction encompasses the entire country, whereas the lower courts’ jurisdiction is spatially limited. The certiorari process also gives the Supreme Court an informational advantage over the lower courts: It can wait to see how multiple lower courts address an issue before granting review. This additional information may reduce the need for it to invoke the political question doctrine.

All of this suggests that the real political question doctrine may have arisen naturally, as a reflection of what judges normally do. The lower courts (on average) have less inclination than the Supreme Court to be drawn into political disputes. The position of the Supreme Court justices seems more secure than that of lower court judges, who may hope for promotion and want to avoid reversal. And in recent decades, Republicans and Democrats have selected Supreme Court justices based on the expectation that they will decide political questions (albeit in different directions for each party)—which is why nominations to the Supreme Court have become political trench warfare.²⁵⁰

248. Two additional factors likely explain the Court’s insistence on reviewing the D.C. Circuit’s political question ruling in *Zivotofsky*. First, the D.C. Circuit had used the political question label for what was in essence a ruling on the merits; that is, the decision falls into the first category of our typology in Part II.B. See *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009) (reasoning that “the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem”), *vacated sub nom.* *Zivotofsky v. Clinton*, 566 U.S. 189 (2012). Second, the D.C. Circuit had invoked the political question doctrine despite a clear federal statute governing the question. See *id.* at 1240 (Edwards, J., concurring) (“The court’s role in this case is to determine the constitutionality of a congressional enactment.”).

249. See *Rucho*, 139 S. Ct. at 2492-93 (describing relevant lower court decisions).

250. See, e.g., Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 303.

(Some of this also occurs with respect to lower court judges, but not to the same degree.) The Court bears the imprint of these expectations in a way that lower courts do not. So even if Tocqueville’s famous observation that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question” was an exaggeration at the time²⁵¹ (and today as well), among the courts only the Supreme Court can decisively convert a political question into a judicial question and answer it.²⁵²

This equilibrium is another reason why the political question doctrine tends not to completely foreclose judicial review. By preserving to itself the authority to review most issues, while also allowing the lower courts to apply the political question doctrine to screen out some cases, the Supreme Court ensures that the doctrine operates more like a denial of certiorari than a permanent disallowance of review.

This account of the political question doctrine also helps explain why, unlike other justiciability doctrines, the political question doctrine should be binding on the state courts—which, as we have noted, has long been a puzzle in this area.²⁵³ Sometimes the political question doctrine is merely another label for a ruling about the scope of federal governmental authority—for example, the President’s recognition power or the Senate’s authority to determine impeachment procedures. Those rulings should naturally be binding on state courts as a matter of federal substantive law.²⁵⁴ In other situations, as we have explained, the political question doctrine is a screening device relating to the

251. See Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMMENT. 485, 486, 503-04 (2004) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945)).

252. There are likely other examples of this sort of equilibrium in which the Supreme Court declines to disturb an approach by the lower courts to limiting doctrines that differs from the approach that the Court applies in its own decisions. Cf. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 70 (2017) (finding, based on an empirical study, that *Chevron* deference is much more consequential in the lower courts than at the Supreme Court). But sometimes the Court resists this. For example, the Court has been very active in attempting to direct the lower courts in the application of rules concerning standing to sue. For a recent example, see *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021).

253. See *supra* text accompanying notes 80-85.

254. See Dodson, *supra* note 2, at 719-20; Harrison, *supra* note 72, at 493. Although beyond the scope of this Article, one might question the common recitation by the lower courts that the political question doctrine is jurisdictional. See, e.g., *Bin Ali Jaber v. United States*, 861 F.3d 241, 245 (D.C. Cir. 2017). The extent to which the doctrine operates as a jurisdictional limitation rather than a limitation on the merits of adjudication may depend on whether it is emanating at least in part from Article III. It is possible that the second factor in *Baker* is jurisdictional (because it arguably relates to the nature of a case or controversy) but that the other factors are not. Cf. *Al-Tamimi v. Adelson*, 916 F.3d 1, 7 (D.C. Cir. 2019) (“*Baker*, the fountainhead of the modern political question doctrine, did not definitively resolve whether the doctrine is jurisdictional.”).

institutional capacity of the courts in comparison with other actors. With respect to matters declared by the federal courts to be political, such as certain foreign affairs questions, state courts have even less capacity than the lower federal courts, and the prudential reasons for not deciding are even stronger there. These considerations go beyond whether a dispute is a “case or controversy” for purposes of Article III of the Constitution; rather, they implicate federal institutional considerations of the sort that the Court in other contexts, such as when applying the act of state doctrine, has declared to be binding on the state courts.²⁵⁵

Conclusion

The political question doctrine is a screening mechanism that the lower courts use to take account of limits on their institutional capacity. The Supreme Court has less need for this mechanism, so most of the doctrine’s life must be found in the foothills rather than at the summit of Mount Olympus. From this standpoint, the doctrine is not moribund but full of life. It is not limited in the ways suggested by the “classical” or “functional” theories. The lower court practice is best captured by Bickel’s prudential theory.

Our empirical and theoretical account of the political question doctrine is descriptive rather than normative, and thus we make no claim that the lower courts have applied the doctrine correctly in all instances. Even one who accepts the prudential account of the doctrine may believe that the lower courts behave timidly rather than prudently and urge the Supreme Court to do more to limit lower court reliance on the doctrine.

But our account does suggest that critics of a prudential political question doctrine should stop thinking of it as an anomaly. The self-reflective practice of determining jurisdiction and interpreting substantive law based in part on considerations of relative institutional competence is entrenched throughout

255. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (“[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”). Other judicially-developed doctrines designed to protect national interests are also binding on the states unless and until Congress says otherwise—such as the Dormant Commerce Clause doctrine, inter-governmental immunity, and the disallowance of habeas and mandamus relief issued by state courts against the federal government. A variety of federal common law rules also bind the state courts, such as rules governing the rights and duties of the federal government. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); see also, e.g., Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 N.W. U. L. REV. 585, 586 (2006) (“In these areas, federal common law applies in both federal and state courts . . .”). The common law immunity that foreign officials receive in U.S. courts today is also assumed to be binding on state courts. See Bradley, *supra* note 177, at 6.

The Real Political Question Doctrine
75 STAN. L. REV. 1031 (2023)

American law. Critics need to engage on a broader front. Otherwise, picking off the political question doctrine will likely only deepen judicial reliance on the many other limiting doctrines and encourage judges to smuggle prudential factors into those other doctrines and into the merits of adjudication.²⁵⁶

256. Cf. Curtis Bradley, *Symposium: Zivotofsky and Pragmatic Foreign Relations Law*, SCOTUSBLOG (June 9, 2015, 9:16 AM), <https://perma.cc/8YKP-49CW> (noting that “[i]f functional concerns are stripped out of the political question doctrine in the service of formalism, they may well reemerge at the merits stage”); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 850 (2017) (arguing that efforts to eliminate prudential limits on the exercise of jurisdiction tend to result in the recategorization of these limits as part of substantive law).