

A POLITICS-REINFORCING POLITICAL QUESTION DOCTRINE

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ABSTRACT

*The modern political question doctrine has long been criticized for shielding the political branches from proper judicial scrutiny and allowing the courts to abdicate their responsibilities. Critics of the doctrine thus cheered when the Supreme Court, in *Zivotofsky I*, announced a narrowing of the doctrine. Their joy though may have been short-lived. Almost immediately, *Zivotofsky II* demonstrated the dark side of judicial review of the separation of powers between Congress and the President: deciding separations of powers cases may permanently cut one of the political branches out of certain debates. Judicial scrutiny in a particular case could eliminate political scrutiny in many future ones.*

*A return to the old political question doctrine, with its obsequious deference to political branch decisions, is not the answer. Instead, what is needed is a politics-reinforcing political question doctrine that can balance the need for robust review with the desire for robust debate. The uncertain boundaries between the political branches' overlapping powers create space for political debate. Their overlapping powers allow different groups to access the political system and have a voice on policy. Deciding separation of powers questions once-and-for-all can shut off those access points, shutting down political debate. Whereas the pre-*Zivotofsky* political question suggested abstention when the branches were in agreement and scrutiny when they were opposed, a politics-reinforcing political question doctrine suggests the opposite, allowing live debates to continue while scrutinizing political settlements. In so doing, it brings pluralism and politics back into the political question analysis, encouraging democracy rather than deference.*

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I. INTRODUCTION

In January 2015, Speaker of the U.S. House of Representatives John Boehner invited Israeli Prime Minister Binyamin Netanyahu to address the U.S. Congress on ongoing negotiations between the United States, Iran, and other states over Iran's nuclear program.¹ It was assumed (an assumption which proved true) that Prime Minister Netanyahu would use the opportunity to explain his opposition to the deal then being negotiated by the Executive Branch and to exhort members of Congress to oppose it. From the start, the invitation was controversial. Issued without Executive Branch approval, many critics thought it unwise, divisive, or perhaps even unconstitutional²—an encroachment on the President's power to “receive Ambassadors and other public Ministers.”³ Others praised the invitation, emphasizing Congress's power and duty to keep itself informed on issues before it (in this case, a potential nuclear deal with Iran).⁴ It was generally assumed, however, that the prudence and constitutionality of Speaker Boehner's invitation would be left to democratic politics to resolve. Without clear constitutional doctrine and with judicial review unlikely, it would be the electorate and the political branches responding to it that would ultimately decide whether the invitation was a constitutional effort to assert Congress's role or an unconstitutional power grab.⁵

1. See Press Release, Speaker Boehner's Press Office, Speaker Boehner Invites Israeli Prime Minister Netanyahu to Address Congress (Jan. 21, 2015), <http://www.speaker.gov/press-release/speaker-boehner-invites-israeli-prime-minister-netanyahu-address-congress>.

2. See Mike Lillis, *Pelosi Slams Netanyahu Invite*, HILL (Jan. 22, 2015, 11:19 AM), <http://thehill.com/homenews/house/230393-pelosi-slams-netanyahu-invite> (noting that some Democratic leaders viewed Speaker Boehner's invitation as detrimental to international negotiations with Iran); Michael Ramsey, *Is Netanyahu's Address to Congress Unconstitutional? (UPDATED)*, ORIGINALISM BLOG (Jan. 25, 2015, 6:50 AM), <http://originalismblog.typepad.com/the-originalism-blog/2015/01/is-netanyahus-address-to-congress-unconstitutionalmichael-ramsey.html> (answering the title's question in the affirmative); Peter Spiro, *Is Boehner's Netanyahu Invite Unconstitutional?*, OPINIO JURIS (Jan. 22, 2015, 8:18 AM), <http://opiniojuris.org/2015/01/22/bohners-netanyahu-invite-unconstitutional/> (noting that this event sets “precedent for congressional bypass of executive branch foreign policy”).

3. U.S. CONST. art. II, § 3.

4. See Adam J. White, *The Constitution Doesn't Let President Close Congress's Doors to Israel*, WEEKLY STANDARD (Jan. 26, 2015, 3:26 PM), http://www.weeklystandard.com/blogs/constitution-doesnt-let-president-close-congresss-doors-israel_824707.html.

5. Cf. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 889, 953–54 (2016) (suggesting that political arguments that certain constitutional arguments are made in “bad faith” helps police the boundary between “off-the-wall” and “on-the-wall” arguments).

Those assumptions about how the dispute would be resolved look less certain after the Supreme Court's recent decisions in *Zivotofsky v. Clinton* (*Zivotofsky I*)⁶ and *Zivotofsky v. Kerry* (*Zivotofsky II*).⁷ Faced with the President's decision to ignore Congress's requirement that "Israel" rather than "Jerusalem" be marked as a birthplace for American citizens born there and who so request, the lower courts initially abstained, holding the dispute to be a political question.⁸ The Supreme Court though disagreed, narrowing the scope of the political question doctrine and holding that which branch has the power to designate the place of birth in a U.S. citizen's passport is a constitutional question subject to judicial review.⁹ Faced, in turn, with that constitutional question in *Zivotofsky II*, the Court sided with the Executive Branch, finding that the President's power over the recognition of foreign states and questions of sovereignty was exclusive and unreviewable.¹⁰ Not only was the Executive's policy free from judicial scrutiny, it would be free from congressional scrutiny as well.

Prior to *Zivotofsky I* and *II*, Speaker Boehner's invitation, like Congress's Israel passport law, was in the constitutional gray area. After those decisions though, the constitutional gray area has shrunk. The field is now dominated by blacks and whites. Not only does Speaker Boehner's invitation look far less constitutional under the Court's broad reading¹¹ of the President's power "to receive ambassadors and other public ministers" in *Zivotofsky II*,¹² it suddenly looks ripe for judicial review under *Zivotofsky I*. In the next great debate over U.S. foreign policy, will one more avenue for debate now be foreclosed? Will unapproved speaking invitations, like passport policy, now be off the policy table? For those observers cheering the tightened political question doctrine in *Zivotofsky I* and its promise of subjecting government

6. *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), 132 S. Ct. 1421 (2012).

7. *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076 (2015).

8. *See Zivotofsky I*, 132 S. Ct. at 1426 (noting that the District Court dismissed the case on the ground that it presented a nonjusticiable political question, and that the D.C. Circuit Court of Appeals affirmed that decision).

9. *Id.* at 1427–30.

10. *Zivotofsky II*, 135 S. Ct. at 2084–94.

11. *See* Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 131 (2015) (explaining that the Court's arguments "potentially apply to situations far beyond the recognition context, and the Court provided no principled limit on their broader application").

12. *Zivotofsky II*, 135 S. Ct. at 2085 ("It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.").

policies to greater scrutiny, such a result might seem an unintended and unwelcome consequence.¹³

Of course, a dispute like the one over Speaker Boehner's invitation might never reach a court. Many might even find it implausible that a court would ever decide a dispute over an invitation to speak to Congress. And, in truth, such a dispute would have to clear a number of hurdles to get to a judicial decision, most notably, finding a plaintiff with standing and an interest in actually bringing the case. But such hurdles can be leaped; the vagaries of politics have a way of creating interests in litigation and novel theories of standing that might have previously seemed far-fetched. *Zivotofsky I* and *II* provide no reason not to decide the case if standing can be satisfied. If judicial resolution of the invitation dispute still seems unlikely or even out-of-bounds, the question is why? And the invitation dispute is only one example of the types of separation-of-powers disputes that might now be resolved pursuant to *Zivotofsky I* and *II*.¹⁴

This Article develops an alternative "pluralist" or "politics-reinforcing" political question doctrine that can preserve space for substantive policy debates without shielding the government from proper scrutiny. In so doing, it vindicates the constitutional instinct that the disputes like the Netanyahu invitation are ones no court should resolve.

A politics-reinforcing political question doctrine would be designed to preserve the space in the political system for continued debate over policy issues that the Court's most recent political question jurisprudence threatens to eliminate. The current political question doctrine, its supporters, and its critics all presume that disagreement between Congress and the President should weigh in favor of judicial intervention. This Article contests this presumption, highlighting the underappreciated costs of the current doctrine for robust political debate. It develops a new political question doctrine specifically designed for cases where Congress and the President have overlapping, exclusive powers, and where we want to encourage political debate rather than submerge it in doctrine and court resolution. There are deep disagreements among the public regarding the United States' position regarding Jerusalem, on war-powers, and on negotiations with Iran. Different branches of government, accountable to different electorates, elected in

13. Cf. Curtis Bradley, *Symposium: Zivotofsky and Pragmatic Foreign Relations Law*, SCOTUSBLOG (June 9, 2015, 9:16 AM), <http://www.scotusblog.com/2015/06/symposium-zivotofsky-and-pragmatic-foreign-relations-law/> ("This possibility has important implications for those who call for more robust judicial review in the area of foreign affairs as a means of addressing what they consider to be excessive executive authority.").

14. See *infra* Part II.B.2.

different ways, and using different procedures, can give fuller, richer voice to those disagreements than one branch acting alone. Deciding once and for all which branch has certain powers can unnecessarily cut off debate. Echoing Robert Cover, this Article argues that courts must use their powers of jurisprudence responsibly,¹⁵ exercising care not to submerge political debates beneath clearer separation of powers doctrine.

This focus on preserving space for political debate connects a politics-reinforcing political question doctrine to other streams in constitutional thought including politics-reinforcing judicial review,¹⁶ federalism,¹⁷ and judicial minimalism¹⁸ and picks up arguments in prior political question cases that have so far been doctrinal orphans. It also distinguishes a politics-reinforcing political question doctrine from the way the political question doctrine has often been applied. Unlike other versions of the political question doctrine, a politics-reinforcing political question doctrine is meant to protect or encourage debate rather than limit it. Complaints about the political question doctrine after *Baker v. Carr*¹⁹ usually center on the way courts have used some of the *Baker* categories to insulate Executive or government policies from review.²⁰ Using arguments about the importance of speaking with “one voice”²¹ or the need for finality,²² courts put certain issues beyond political debate. A politics-reinforcing political question doctrine is different. It embraces cacophony, celebrates divergent voices, and encourages pluralism. It counsels abstention or forbearance specifically when the President and Congress are in disagreement, when exercising concurrent, “exclusive” powers, the two branches reach opposite results. And a politics-reinforcing political question doctrine eyes political settlement—speaking with one voice—more skeptically. A politics-reinforcing political question

15. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

16. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102–03 (1980); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668 n.100 (1998).

17. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1059 (observing “[t]hat the separation of powers, including its vertical dimension of federalism, may have the specific purpose of promoting a dialogue among different voices even with regard to foreign policy issues”).

18. See *infra* Part III.A.3. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (2d ed. 1986); CASS R. SUNSTEIN, *ONE CASE AT A TIME* 4 (1999).

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

20. See *infra* notes 80, 94 and accompanying text.

21. See, e.g., *Made in the USA Found. v. United States*, 242 F.3d 1300, 1317–18 (11th Cir. 2001).

22. See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987).

doctrine is least desirable when Congress and the President are in agreement because in those cases, political debate has already ended or been cut off.

Nor is a politics-reinforcing political question doctrine about disabling judicial power; unlike current versions of the doctrine, it is not a claim that the judiciary cannot act, lacks power to act, or would be acting disrespectfully to the other branches to intervene. It is, instead, about empowering the judiciary to make prudential judgments about when to answer certain questions and when to save them for another day.²³ And a politics-reinforcing political question doctrine is not meant to be an elaboration on one of the six categories laid out on *Baker*²⁴ or the two categories emphasized in *Zivotofsky I*.²⁵ It is a separate doctrine with a different justification.²⁶

Most of all, a politics-reinforcing political question doctrine provides the coherent, balanced logic the doctrine has long lacked. Whereas proponents of a broader political question doctrine have advocated more space for politics and democracy, its opponents have focused on the courts' obligations to say what the law is and the duty to vindicate individual rights against an overreaching government. And debates, to date, over the political question doctrine have largely been all-or-nothing propositions: those in the first category urge abstention in wide swathes of foreign relations or national security cases and argue for a broad political question doctrine; those in the second argue for a narrow one or its elimination altogether. No distinction is drawn based on the President's and Congress's relative positions towards each other. Moreover, as will be explained more below, opponents of a broad political question doctrine in foreign relations and national security cases seem to have made certain assumptions about how the substantive separation

23. As will be explained *infra*, a politics-reinforcing political question doctrine thus bears more in common with the power over certiorari or the doctrine of constitutional avoidance, prudential tools of the judiciary, than justiciability doctrines drawn from the scope of Article III of the Constitution.

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

25. *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1427 (2012); see discussion *infra* Part II.B.1.

26. A politics-reinforcing political question doctrine might have implications for current versions of the political question doctrine, but it is meant to complement, rather than replace them. Thus, for example, the first two *Baker* factors endorsed in *Zivotofsky II*, textual commitment of a question to another branch and a lack of judicially manageable standards, would remain additional reasons for abstention alongside a politics-reinforcing political question doctrine. As will become obvious *infra*, a politics-reinforcing political question doctrine might suggest reading the other *Baker* categories much more narrowly (if using them at all), but one need not take that position. One could embrace both a politics-reinforcing political question doctrine and a broader understanding of the *Baker* factors; these would just present countervailing reasons either for or against abstention that would have to be weighed against one another in a given case.

of powers issues would be resolved in the doctrine's absence. Those opponents cheered the tightening of the political question doctrine in *Zivotofsky I* as a promise that government policies would henceforth be subjected to greater judicial scrutiny. *Zivotofsky II*'s endorsement of broad, unreviewable Executive control of questions related to the recognition of foreign states and governments suggests that assumption was unwise.²⁷ A politics-reinforcing political question doctrine provides a more calibrated approach, one more carefully attuned to how decisions to abstain or defer in *particular* cases will encourage fewer or more checks on government authority. It provides a clear path between the two traditional poles of the debate, explaining when a court should favor politics and when it should intercede.

Part II describes the history of the modern political question doctrine from *Baker* through *Zivotofsky II*. Part II.A describes *Baker*'s reformulation of the political question doctrine as a function of six factors, the application of those factors by courts over the following decades, and the criticism that modern doctrine engendered. It explores how the *Baker* factors came to be molded into a shield, sheltering the government from scrutiny. Part II.B describes the Court's reaction to those trends in *Zivotofsky I*, and how the narrower version of the doctrine described there led to the substantive result in *Zivotofsky II*. This Part then explores the implications of *Zivotofsky II*, suggesting unresolved areas of constitutional law that may now be resolved and the impact resolution might have on the room for political debate over substantive questions of foreign and defense policy and for "negotiated" solutions to separation of powers question like the War Powers Act or Executive Agreements.

Part III teases out an alternative route. Part III.A explores structural, theoretical, and historical arguments for protecting Congress's and the President's ability to disagree. It also follows hints of more pluralistic, democracy-enforcing arguments for judicial forbearance strewn through decisions on standing or the political question doctrine that have so far been obscured by the *Baker* factors. Part III.B brings these ideas together to forge a politics-reinforcing political question doctrine, describing when and how it operates, as well as how it relates to current forms of the political question and standing doctrines. Despite picking up on themes across constitutional law, a politics-reinforcing political question doctrine is a radical departure from the applications urged by current doctrine, its supporters, and its critics,

27. Cf. Jean Galbraith, *Zivotofsky v. Kerry and the Balance of Power*, 109 AJIL UNBOUND 16, 17–18 (2015) (suggesting that, in hindsight, it might have been best if the Court had decided the case in a way that would have had less precedential effect).

all of whom assume that abstention will be less warranted when Congress and the President are actually and actively opposed. This Section explains where that existing assumption came from as well as why that assumption is only half-right. It explains how application of a politics-reinforcing political question doctrine would respond to the concerns behind that assumption while also protecting the space for democracy and debate from unduly restrictive interpretations of congressional and/or presidential power.

Part IV applies the politics-reinforcing political question described here to a series of different cases to explore how it might work in practice. In particular, this Part focuses on the three prototype cases, *Youngstown*,²⁸ *Zivotofsky*,²⁹ and *Boumediene*,³⁰ to explain how a politics-reinforcing political question doctrine might or might not change how those cases would have been decided. *First*, designed to encourage fulsome debate, a politics-reinforcing political question doctrine would not ignore congressional or presidential aggrandizement. If, on first analysis, one of the two political branches cannot make a reasonable argument that it has the power it is claiming, courts should not hesitate to strike down that branch's action. *Second*, designed to reinforce political channels for debate, a politics-reinforcing political question doctrine will be most applicable where that debate remains robust and least applicable where it seems to have run out or broken down. And *third*, a politics-reinforcing political question doctrine must take individual rights seriously. The importance of individual rights claims must be weighed against structural concerns about leaving room for future debate. Where individual rights must be vindicated, a court cannot abstain entirely. A politics-reinforcing political question doctrine though suggests that such a court should try to minimize the effect of its decision on the broader political process, avoiding wherever possible, broad, final decisions on the allocation of powers between the political branches.

A new political question *doctrine* may be too much for some to embrace. My hope though is the tests laid out in Part IV can still serve as a set of softer pluralist justiciability principles—a politics-respecting checklist that courts can use to decide when and how to approach separation of powers disputes. The goal of both a more fulsome doctrine laid out in this Article and such politics-reinforcing justiciability principles is the same: to guarantee that courts properly consider the effects their decisions might have on the space for robust political debates in the future.

Part V concludes.

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

29. *Zivotofsky I*, 132 S. Ct. 1421.

30. *Boumediene v. Bush*, 553 U.S. 723 (2008).

II. THE MODERN POLITICAL QUESTION DOCTRINE: PROTECTING POLITICAL DECISIONS

A. *From Marbury to Zivotofsky*

1. Doctrinal Origins

The first suggestion that U.S. courts should refrain from deciding certain “political questions” ironically appears in the same Chief Justice Marshall opinion that announced judicial review and that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”³¹ As the Chief Justice wrote in *Marbury v. Madison*, “the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.”³² Unlike those questions subject to judicial review, those “subjects are political,” and “whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.”³³ “[T]he decision of the executive is conclusive.”³⁴

Over time, the courts expanded on this notion, describing a range of questions that were essentially “political” rather than “judicial” and should thus be left to Congress, the President, or both. Some of these were related to foreign policy, including recognition of foreign sovereigns and sovereign control of territory,³⁵ the continued effect of treaties,³⁶ or whether or not the United States was or remained at war.³⁷ Others went to the powers of government actors, including decisions whether states had violated the Constitution’s guarantee of a republican form of government,³⁸ the proper

31. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

32. *Id.* at 165–66.

33. *Id.* at 166.

34. *Id.*

35. *See, e.g., Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 418 (1839).

36. *See, e.g., Clark v. Allen*, 331 U.S. 503, 514 (1947) (“[T]he question whether a state is in a position to perform its treaty obligations is essentially a political question.”).

37. *See, e.g., Ludecke v. Watkins*, 335 U.S. 160, 168–69 (1948) (“‘The state of war’ may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act.”).

38. *See, e.g., Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568–69 (1916); *Luther v. Borden*, 48 U.S. 1, 18 (1849).

apportionment of congressional districts,³⁹ proper modes for amending the U.S. Constitution,⁴⁰ and impeachment.⁴¹ In some cases, as with many of the foreign policy questions above, the courts simply treated the government's decision as an unreviewable fact. In others, as with those that challenged the powers of particular branches of government, the courts abstained from hearing the case altogether.⁴²

2. *Baker v. Carr*

The Court sought to bring some coherence to this somewhat random set of political questions and define more clearly when the courts should or should not invoke it in *Baker v. Carr*.⁴³ In the process of explaining why the drawing of state legislative districts could be justiciable, Justice Brennan described six factors that might make a case a political question immune from judicial review. Those six factors included: (1) “textually demonstrable constitutional commitment of the issue to a coordinate political department;” (2) “a lack of judicially discoverable and manageable standards for resolving it;” (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;” (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;” (5) “an unusual need for unquestioning adherence to a political decision already made,” sometimes described as the need for “finality;” and (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question,” or the need of the United States to speak with one voice.⁴⁴

39. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004).

40. *Coleman v. Miller*, 307 U.S. 433, 456 (1939).

41. *Nixon v. United States*, 506 U.S. 224, 237–38 (1993).

42. Tara Leigh Grove has argued that the former represented the “traditional political question doctrine” and was only fully displaced by the latter, “modern political question doctrine” requiring abstention in *Baker*. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911–14 (2015). Jack Goldsmith made a similar argument. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1401 (1999) (“This categorical approach to political questions in the foreign relations context changed after *Baker v. Carr*.”).

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

44. *Id.* at 217, 222.

3. Foreign Relations as Political Question

a. *At the Supreme Court*

After *Baker*, the courts applied the factors to a wide range of cases, but over time, fewer and fewer questions seemed to fall into the “political” category beyond judicial scrutiny.⁴⁵ Foreign affairs and national security remained the major exception. Despite Justice Brennan’s counsel that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,”⁴⁶ application of the political question doctrine to foreign relations and national security cases has remained common. As Thomas Franck explained in 1992, “the political-question doctrine’s domestic use has been virtually eradicated in recent years even as its applicability to foreign affairs has been reinforced by the courts.”⁴⁷ “The doctrine, which once applied to many areas of governance, now applies almost exclusively to foreign-affairs and national-security cases.”⁴⁸ More than twenty years later, that picture has not really changed.

Between *Baker* and *Zivotofsky I*, the Supreme Court said relatively little on the application of the political question doctrine to foreign affairs and national security, and what it did say was hardly crystal clear. In *Goldwater v. Carter*, Justice Rehnquist, writing for four justices, argued that the case should be dismissed because the question of whether the President could terminate a treaty without the support of Congress was “‘political’ and therefore nonjusticiable.”⁴⁹ As he explained, “it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.”⁵⁰ Without directly referencing *Baker* factors,⁵¹ Justice Rehnquist argued that the Constitution was silent on the procedures for terminating a treaty and that thus “the instant case[,] in [his] view[,] also ‘must surely be

45. The cases to which the doctrine was applied increasingly looked like special exceptions. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 272 (2004) (gerrymandering); *Nixon v. United States*, 506 U.S. 224, 227–28 (1993) (impeachment).

46. *Baker*, 369 U.S. at 211.

47. THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 19 (1992).

48. *Id.* at 20.

49. *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

50. *Id.*

51. See Lisa Rudikoff Price, *Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT’L L. & POL. 323, 336 (2005) (“For example, the Supreme Court did not follow *Baker*’s case-by-case approach in *Goldwater v. Carter*.”).

controlled by political standards.”⁵² Further, he argued, “the justifications for concluding that the question here is political in nature are even more compelling . . . because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked.”⁵³ To the extent Justice Rehnquist was applying the *Baker* factors, he seemed to be scrunching all six into a ball, finding that the issue was left to the other branches of government in part because there was no clear constitutional answer and in part because foreign relations and national security raised particular concerns about policy space, embarrassment, finality, and speaking with one voice.

Justice Powell also voted to dismiss, but because without clear congressional opposition to the President on terminating the treaty, the dispute was not yet ripe for judicial review.⁵⁴ He thoroughly disagreed with Justice Rehnquist that the case was a political question.⁵⁵ Applying the *Baker* factors, he found none applicable. Presaging the majority opinion in *Zivotofsky I*,⁵⁶ Justice Powell argued that the treaty termination question before the Court was not a “political” one textually committed to another branch of government, but a judicial one, namely, to which branch or branches the Constitution granted that power.⁵⁷ Nor were there no judicially manageable standards to decide the case.⁵⁸ The constitutional question was a difficult one, but no more difficult than many other questions the Court was required to answer. The Court would not be imposing its policy judgment regarding the treaty with Taiwan at issue but simply determining which branches were allowed to make that policy judgment.⁵⁹ And concerns about respect, finality, and the need for the country to speak with one voice all seemed overblown, particularly if the case were ripe for review and Congress and the President were in actual disagreement over the Mutual Defense Treaty with Taiwan. Justice Brennan, who dissented and would have decided the dispute, agreed with Justice Powell on the political question doctrine.⁶⁰ “Mr. Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations,” he wrote.⁶¹

52. *Goldwater*, 444 U.S. at 1003.

53. *Id.* at 1003–04.

54. *Id.* at 997 (Powell, J., concurring).

55. *Id.* at 998 (Powell, J., concurring).

56. See discussion *infra* Part II.B.1.

57. *Goldwater*, 444 U.S. at 998–99 (Powell, J., concurring).

58. *Id.* at 999 (Powell, J., concurring).

59. *Id.* at 1000–01 (Powell, J., concurring).

60. *Id.* at 1006–07 (Brennan, J., dissenting).

61. *Id.* at 1006 (Brennan, J., dissenting).

The Court returned to the question of the political question doctrine and foreign affairs seven years later, and in *Japan Whaling Ass'n v. American Cetacean Society*,⁶² recognized some limits on the doctrine's application to foreign relations cases. Faced with a challenge to the Secretary of Commerce's decision not to certify Japan for failing to comply with International Whaling Commission quotas, the Court observed that "the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."⁶³ Finding the question in this case to be "a purely legal question of statutory interpretation," the Court found no reason to abstain.⁶⁴

And during the fifty years between *Baker* and *Zivotofsky*, the Supreme Court certainly considered and reached the merits of its fair share of foreign affairs and national security cases. Questions regarding treaty interpretation,⁶⁵ detainee rights,⁶⁶ and military commissions,⁶⁷ whether explicitly or implicitly, were found to raise judicial rather than political questions that the Court could and did decide.

b. In the Lower Courts

The real action on the political question doctrine was happening in the lower courts, where the courts were applying the six *Baker* factors to abstain from a wide array of foreign relations cases. Perhaps influenced by the breadth of Justice Rehnquist's opinion in *Goldwater*, the lower courts read the first *Baker* factor very broadly, finding the overall conduct of foreign policy textually committed by the Constitution to the political branches. They combined this finding with a heavy reliance on the more "prudential" *Baker* factors—the need for a policy judgment,⁶⁸ concerns of embarrassing the other

62. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986).

63. *Id.* at 230.

64. *Id.*

65. *See, e.g.*, *BG Grp., PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1206 (2014); *Lozano v. Alvarez*, 134 S. Ct. 1224, 1235 (2014); *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013); *Abbott v. Abbott*, 560 U.S. 1, 5 (2010); *Medellín v. Texas*, 552 U.S. 491, 497–99 (2008).

66. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 755 (2008); *Rasul v. Bush*, 542 U.S. 466, 472–73 (2004).

67. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

68. *See Made in the USA Found. v. United States*, 242 F.3d 1300, 1317 (11th Cir. 2001) (finding that the court "would be unavoidably thrust into making policy judgments of the sort unsuited for the judicial branch").

branches,⁶⁹ concerns about finality,⁷⁰ and the importance of the United States speaking with one voice⁷¹—to simply avoid complicated foreign relations and national security cases. And the lower courts did so both before and after *Japan Whaling*.⁷² The Supreme Court, for its part, ignored this trend more than it encouraged it.

Thus, for example, in *Schneider v. Kissinger*,⁷³ the D.C. Circuit affirmed dismissal of a claim brought against Henry Kissinger and the United States for their involvement in a coup in Chile and the resultant death of Chilean General René Schneider.⁷⁴ For the D.C. Circuit, “the lawsuit raise[d] policy questions that are textually committed to a coordinate branch of government.”⁷⁵ As the court explained, “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”⁷⁶ Beyond that though, the court “conclude[d] that at least the first four of the six *Baker* factors compel a determination that this case raises political questions committed to the political branches and therefore is beyond the jurisdiction of the courts.”⁷⁷

Similarly, in *Corrie v. Caterpillar*, the Ninth Circuit affirmed dismissal of a claim against Caterpillar for selling bulldozers to the Israeli Defense Forces that they should have known would be used to demolish Palestinian homes

69. See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007) (“[W]e are 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.”); *Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987) (“[T]he Court would risk the potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question.”) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

70. See *Corrie*, 503 F.3d at 983 (observing that the challenged decision was “not only a decision committed to the political branches, but a decision those branches have already made”).

71. See *Made in the USA Found.*, 242 F.3d at 1318 (“A judicial declaration invalidating NAFTA at this stage would clearly risk ‘the potentiality of embarrassment from multifarious pronouncements by various departments on one question.’”) (quoting *Baker*, 369 U.S. at 217); *Lowry*, 676 F. Supp. at 340 (“[T]his Court concludes that the volatile situation in the Persian Gulf demands, in the words of *Baker v. Carr*, a ‘single-voiced statement of the Government’s views.’”) (quoting *Baker*, 369 U.S. at 211).

72. Although the Circuit Courts cite *Japan Whaling* following the Supreme Court’s decision in that case, that decision seems to have done very little to restrict Circuit Court use of the political question doctrine.

73. *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

74. *Id.* at 191–92.

75. *Id.* at 194.

76. *Id.* (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)).

77. *Id.* at 198.

and which ended up causing the death of the plaintiffs' relatives.⁷⁸ Observing that “cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary,”⁷⁹ the court found that the claim raised a political question because Caterpillar's sales were part of an aid program authorized by Congress and the President.⁸⁰ Beyond raising questions textually committed to the political branches, “Plaintiffs’ action also runs head-on into the fourth, fifth, and sixth *Baker* tests because whether to support Israel with military aid is not only a decision committed to the political branches, but a decision those branches have already made.”⁸¹ In particular, the court 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.”⁸²

These decisions were emblematic. Similar logic was used to dismiss claims involving or implicating a wide variety of foreign policy issues,⁸³ from claims of failure to comply with the War Powers Resolution,⁸⁴ to claims arising from nuclear testing,⁸⁵ to challenges to the constitutionality of the North American Free Trade Agreement.⁸⁶ In 1999, Jack Goldsmith counted “several dozen political question dismissals in foreign relations contexts” in the years following *Baker*.⁸⁷ Many more followed in the decade and a half since.

78. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977 (9th Cir. 2007).

79. *Id.* at 982 (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 559 (9th Cir. 2005)).

80. *Id.* at 982–83.

81. *Id.* at 983.

82. *Id.* at 984.

83. See FRANCK, *supra* note 47, at 45–60 (collecting cases); Goldsmith, *supra* note 42, at 1402–03 (collecting cases).

84. *Lowry v. Reagan*, 676 F. Supp. 333, 340–41 (D.D.C. 1987).

85. *Antolok v. United States*, 873 F.2d 369, 383–84 (D.C. Cir. 1989) (“It would require our invasion of their sphere for us to make the determination that they were wrong, and it is against that very invasion that the political question doctrine protects the political realm from judicial invasion.”).

86. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1314 (11th Cir. 2001) (finding “that the Constitution’s clear assignment of authority to the political branches of the Government over our nation’s foreign affairs and commerce counsels against an intrusive role for this court in overseeing the actions of the President and Congress in this matter”).

87. Goldsmith, *supra* note 42, at 1403.

4. Political Question Critics and Defenders

While the Supreme Court may have been ignoring the way the lower courts were expanding the political question doctrine, scholars were not. The lower courts' apparent eagerness to avoid foreign affairs cases subjected them and the political question doctrine to considerable criticism.

For example, in one of the most famous critiques, Thomas Franck argued that "the abdicationist tendency, primarily expounded in what has become known as the 'political-question doctrine,' is not only not required by but wholly incompatible with American constitutional theory."⁸⁸ As Franck explained, "[a] foreign policy exempt from judicial review is tantamount to governance by men and women emancipated from the bonds of law."⁸⁹ Worse though, explained Franck, the doctrine as it stood left far too much discretion to individual judges, creating "a state of jurisprudential chaos,"⁹⁰ or "jurisprudential incoherence."⁹¹

For Jack Goldsmith, the post-*Baker* political question doctrine "became a discretionary tool for courts to abstain whenever they decide, based on an independent analysis of U.S. foreign relations, that an adjudication would harm U.S. foreign relations or the political branches' conduct of those relations."⁹² "[U]nder the guise of judicial modesty," the courts have used the doctrine "to alter the scope of federal foreign relations law" in ways neither desirable nor legitimate.⁹³ Rather than removing themselves from foreign policy questions, judges had inserted themselves into them, agglomerating to themselves the authority to determine which policies to review and which to avoid. A "new formalism" was needed, Goldsmith argued, that would, among other things, reduce judicial discretion and restrain use of the political question doctrine.⁹⁴

Together with others, these critics also began to chip away at the theoretical case for a broad foreign affairs political question doctrine,⁹⁵ explaining the impossibility of cleanly dividing cases into foreign and

88. FRANCK, *supra* note 47, at 4–5. "What is the point of a carefully calibrated system of divided and limited power if those who exercise authority can secure an automatic exemption from its strictures merely by playing the foreign-affairs trump?," Franck asked. *Id.* at 5.

89. *Id.* at 8.

90. *Id.*

91. *Id.* at 9.

92. Goldsmith, *supra* note 42, at 1402.

93. *Id.* at 1396.

94. *Id.* at 1396–97.

95. See generally Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 814–16 (1989) (rebutting several purported justifications of the political question doctrine).

domestic affairs categories⁹⁶ and questioning the assumptions that the consequences or dangers of judicial involvement in foreign relations cases is somehow greater than others,⁹⁷ that courts are less expert in foreign than domestic cases,⁹⁸ and that the United States should always speak with “one voice” in foreign affairs.⁹⁹ With these assumptions undermined, they argued, the case for a special foreign affairs political question doctrine seemed to disintegrate.

Other scholars continued to defend broad judicial abstention in foreign relations.¹⁰⁰ In some cases, they took on criticisms of the *Baker* factors, but used those criticisms to smooth the doctrine’s rough edges rather than to undermine it entirely. The political question doctrine they advocated was refined, but still broad. Thus Jide Nzelibe critiques the assumptions that foreign relations lack judicially manageable standards, requires a single voice, or involves unusually high stakes, but nonetheless defends a still broad political question doctrine on institutional competence grounds, arguing that the political branches may be better situated to follow the shifting meaning of international law and that the courts lack the authority to effectuate their decisions in foreign affairs.¹⁰¹ Daniel Abebe questions the assumptions underlying the one voice justification for the doctrine, particularly whether it

96. “At the end of the twentieth century, in a world so interdependent that the flow of persons, goods, and ideas between states is almost as ordinary as between states of our Union, no ‘affair’ is any longer exclusively denominable as ‘foreign.’ [E]very ‘foreign’ expenditure of lives and treasure, has significant domestic repercussions. The elements of these mixed domestic-foreign affairs often cannot be disentangled even in theory, let alone in practice.” FRANCK, *supra* note 47, at 9; *see also* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 675–86 (2002) (arguing that in an era of globalization, a broad political question no longer makes sense).

97. *See* FRANCK, *supra* note 47, at 50–58; Goldsmith, *supra* note 42, at 1414; Price, *supra* note 51, at 346–47 (arguing that the courts are ill-placed to determine if any of those dangers are truly likely); Spiro, *supra* note 96, at 678–82.

98. *See* FRANCK, *supra* note 47, at 46–48; Goldsmith, *supra* note 42, at 1416–18; Price, *supra* note 51, at 330–31 (suggesting courts gain the needed expertise by deciding cases).

99. *See* Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233, 233–34 (2012); Goldsmith, *supra* note 42, at 1426–27; Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 130–34 (2009); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1023–32 (2014) (and scholars cited there); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 964–66 (2004).

100. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 300–01 (1996); *see also* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1605 n.38 (2014); *cf.* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6–7 (2013).

101. *See generally* Nzelibe, *supra* note 99.

is really necessary when the United States exercises hegemonic power.¹⁰² Abebe defends its use though when the United States faces competition from other powers in international relations.¹⁰³

B. Zivotofsky and After

1. Zivotofsky I and II

It was in the shadows cast by the broad foreign affairs political question doctrine and scholarly debates over its wisdom and legitimacy that Menachem Zivotofsky's claim was argued. In 2002, as part of the Foreign Relations Authorization Act, Congress provided that, when an American citizen was born in Jerusalem and he or she (or their legal guardian) so requested, the U.S. Department of State would list Israel as his or her place of birth.¹⁰⁴ This ran contrary to longstanding Executive Branch policy that the United States took no position on the sovereignty of Jerusalem and that only Jerusalem should be listed on passports. As a result, President George W. Bush issued a statement when signing the Act into law, observing that the Jerusalem provision would "interfere with the President's constitutional authority to . . . determine the terms on which recognition is given to foreign states."¹⁰⁵

After Menachem Zivotofsky was born in Jerusalem, his parents, American citizens, requested that his passport list Israel as his place of birth.¹⁰⁶ When the State Department refused, the Zivotofskys sued.¹⁰⁷ The case was dismissed, with the majority in the D.C. Circuit finding that the dispute presented a political question.¹⁰⁸ As Judge Griffith explained, recognition of foreign governments is a power textually committed by the Constitution to the President, and the State Department's challenged policy with regard to

102. *See generally* Abebe, *supra* note 99.

103. *Id.* at 237.

104. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

105. GEORGE W. BUSH, Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH 1697, 1698 (2005).

106. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1229 (D.C. Cir. 2009), *vacated and remanded sub nom. Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421 (2012).

107. *Id.*

108. *Id.* at 1233.

Jerusalem was accordingly nonjusticiable.¹⁰⁹ Judge Edwards added a concurrence, agreeing that the State Department’s policy was a valid use of the President’s recognition power but disagreeing that it was a political question.¹¹⁰

In *Zivotofsky v. Clinton*, or *Zivotofsky I*, Chief Justice Roberts, writing for the majority of the Supreme Court, found the case justiciable.¹¹¹ “[T]he Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid,’” the Chief Justice explained, and the political question doctrine is only a “narrow exception.”¹¹² The Court of Appeals had construed the first *Baker* factor too broadly. The Court *will* dismiss those cases that force it to review a question textually committed to another branch, Chief Justice Roberts explained.¹¹³ But that is not the claim *Zivotofsky* raised. Instead, the question raised by *Zivotofsky*’s claim was one of constitutional interpretation: Which branch, Congress or the President, has the authority to determine the “place of birth” notation on U.S. passports?¹¹⁴ Once it is determined which branch has the authority to make that policy judgment, then policy decisions of that branch will be nonjusticiable.¹¹⁵

Notably, in discussing application of the political question doctrine, Chief Justice Roberts mentioned only the first two *Baker* factors—“a textually demonstrable constitutional commitment of the issue to a coordinate political department” and “a lack of judicially discoverable and manageable standards for resolving it.”¹¹⁶ The other four—the avoidance of judicial policymaking, the need to avoid embarrassment, the need for finality, or concerns about maintaining “one voice” in foreign affairs¹¹⁷—are notably omitted. The implication that those four factors were no longer valid was not lost on Justice Sotomayor, who wrote a concurrence with the main purpose of resuscitating them.¹¹⁸

After remand, appeal, and certiorari, the Supreme Court was again faced with Menachem *Zivotofsky*’s claim in *Zivotofsky v. Kerry*, or *Zivotofsky II*—this time, on the merits.¹¹⁹ Which branch, the President or Congress, had

109. *Id.* at 1231–33.

110. *Id.* at 1233–45.

111. *Zivotofsky I*, 132 S. Ct. at 1431.

112. *Id.* at 1427 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

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

118. *Zivotofsky I*, 132 S. Ct. at 1431–35.

119. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076 (2015).

ultimate authority to determine the country or city listed as a place of birth in the passports of American citizens? Justice Kennedy, writing for the majority, found the question of whether to list “Jerusalem” or “Israel” on a passport to be a function of the recognition power, itself part of the exclusive presidential power to “receive ambassadors and other public ministers.”¹²⁰ “[T]he Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not,”¹²¹ Justice Kennedy explained. All means of recognition—receiving a foreign ambassador, negotiating a treaty, nominating a U.S. ambassador, and opening diplomatic channels—are within the President’s ultimate control.¹²² “Recognition is a topic on which the Nation must ‘speak . . . with one voice,’”¹²³ writes Justice Kennedy, and “[t]hat voice must be the President’s.”¹²⁴ As such, wrote Justice Kennedy, “Congress may not pass a law, speaking in its own voice, that effects formal recognition,” and “it may not force the President himself to contradict his earlier statement.”¹²⁵ Congress’s passport requirements regarding Jerusalem were invalid.

For Chief Justice Roberts, dissenting, the breadth of the majority’s ruling was “stark.”¹²⁶ “Assertions of exclusive and preclusive power leave the Executive ‘in the least favorable of constitutional postures,’ and such claims have been ‘scrutinized with caution’ throughout this Court’s history.”¹²⁷ “For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.”¹²⁸ The majority’s view, recognizing an exclusive presidential recognition and disabling congressional action, was thus a “perilous step.”¹²⁹

Justice Scalia, also dissenting, argued for a narrower result that would have left the full contours of Executive and of congressional power ambiguous.¹³⁰ While he thought the evidence might suggest concurrent presidential and congressional powers over recognition,¹³¹ Justice Scalia saw

120. *Id.* at 2085–87.

121. *Id.* at 2086.

122. *Id.* at 2085–86.

123. *Id.* at 2086 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003)).

124. *Id.*

125. *Id.* at 2095.

126. *Id.* at 2113.

127. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640, 638 (1952) (Jackson, J., concurring)).

128. *Id.*

129. *Id.* at 2116.

130. *Id.* at 2116–23.

131. *Id.* at 2118.

no need to answer that question definitively. “[T]he Constitution may well deny Congress power to recognize,”¹³² but a passport requirement passed by Congress was not, in his view, an act of recognition. Regardless of the scope of the President’s recognition power, the President needed to comply with Congress’s requirements.

2. Future Sequels

Zivotofsky I’s narrowing of the political question doctrine, coupled with *Zivotofsky II*’s broad, conclusive recognition of an exclusive Executive power, suggests that unresolved questions regarding the boundaries of Executive and congressional powers may now be resolved.¹³³ More importantly, they highlight a possibility that seems to have previously been discounted: Many seem to have assumed that a narrower political question doctrine would subject the branches to greater scrutiny, increase space to contest government policies, and reduce the space for unilateral presidential or congressional action. A narrower political question doctrine would be too small a shield for a President or Congress to stand behind and defend foreign policy actions. *Zivotofsky I* and *II*, though, reveal that the opposite is just as likely—that, once the political question shield is avoided, the Court can go the other way as well, recognizing broad contours to Executive or congressional power that do not simply remove their acts from judicial view, but that cut off *all* scrutiny, constitutionally validating them.¹³⁴ More problematic, *Zivotofsky I* and *II* demonstrate how resolving a constitutional separation of powers question can affect substantive political debates, removing avenues different voices would otherwise use to be heard. Three examples—(1) congressional interactions with foreign leaders, (2) congressional limitations of the use of the military, including the War Powers Resolution, and (3) Executive agreements—can demonstrate the potential democracy-reducing effects of the current doctrines.

132. *Id.* at 2121.

133. See Goldsmith, *supra* note 11, at 114 (“These and other elements of the analytically promiscuous decision will influence separation-of-powers disputes far beyond the recognition context.”).

134. Cf. Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 64 (2014) (“Furthermore, if one is concerned about the growth of executive power, one should not assume that more robust judicial review will be a corrective, because it is possible, if not probable, that courts will end up legitimating many exercises of executive authority.”).

a. *Congressional Interactions with Foreign Leaders*

This is the area most clearly affected by the two *Zivotofsky* decisions. Despite well-worn dicta that the Executive is the sole organ of intercourse with foreign nations,¹³⁵ members of Congress have, from time-to-time, communicated directly with foreign leaders in an effort to influence U.S. foreign policy. Two recent instances present good examples. The first is Speaker of the House Boehner's invitation to Israeli Prime Minister Binyamin Netanyahu discussed above.¹³⁶ The Speaker's invitation without Executive Branch approval was part of a broader debate about U.S. policy with regard to Iran, and, specifically, the then-ongoing negotiations over the future of Iran's nuclear program. It was clearly designed to give voice and a platform to those in Congress and their constituents who favored a harder-line on Iran and opposed the deal that was reportedly being negotiated. As part of the same debate, Senator Tom Cotton sent a letter on behalf of forty-seven Senators to the leaders of Iran, explaining the potential constitutional effect of a deal made only by the President and the possibilities under U.S. law that a future Congress or President could revoke it.¹³⁷ While the Boehner-Netanyahu invitation was an attempt to create space for domestic opponents of the negotiations to gain domestic support and thus influence U.S. policy, the Cotton letter was an attempt by Senators opposed to the deal to reassert their authority within the negotiations, suggesting to Iranian leaders that, even if their formal approval would not be needed, it might be wise to take their concerns into consideration.

In the cases of both the Boehner-Netanyahu invitation and the Cotton letter, observers raised questions about the wisdom and constitutionality of the tactics.¹³⁸ High on critics' list of concerns were the President's Article II

135. See, e.g., *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President [is] . . . the Nation's organ for foreign affairs."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) (creating in dicta the so-called "sole-organ" doctrine, which implies an exclusive right of the Executive in foreign relations).

136. See *supra* notes 1–4 and accompanying text.

137. *Cotton and 46 Fellow Senators to Send Open Letter to the Leaders of the Islamic Republic of Iran*, ARK. SENATOR TOM COTTON (Mar. 9, 2015), http://www.cotton.senate.gov/?p=press_release&id=120. Senator Cotton later added another Senator to the list, rounding out the final number to forty-seven; see Sean Sullivan, *With Iran Letter, Tom Cotton Emerges as Leading GOP National Security Hawk*, WASH. POST (Mar. 11, 2015), https://www.washingtonpost.com/politics/with-iran-letter-tom-cotton-emerges-as-leading-gop-national-security-hawk/2015/03/11/4ce05a4e-c74f-11e4-a199-6cb5e63819d2_story.html.

138. See, e.g., Elizabeth A. Cobbs, *Why Boehner's Invite to Netanyahu is Unconstitutional*, REUTERS (Mar. 2, 2015), <http://blogs.reuters.com/great-debate/2015/03/01/netanyahu-invite-is-a>

power to “receive Ambassadors and other public Ministers”¹³⁹ and the President’s constitutional role in negotiating with foreign states.¹⁴⁰ Critics also, as they often do under those circumstances, trotted out the Logan Act, which makes it a felony for an unauthorized citizen to communicate with foreign officials.¹⁴¹ In general though, those legal and policy questions were left to the public to decide. The wisdom and legality of the invitation and letter would be tested at the ballot box. And these methods of resolution had arguably worked over the years, constraining members of Congress to test the boundaries of their power very rarely. Critics’ quick turn to a tiny number of precedents—Speaker Nancy Pelosi’s visit to Syria¹⁴² and Speaker Jim Wright’s negotiations with the Sandinista government in Nicaragua¹⁴³—proves as much.

After *Zivotofsky I* and *II* though, that political mode of resolution seems outdated. As described above, the Court in *Zivotofsky II* drew a broad, exclusive presidential recognition power, in part, from the President’s Article II power to “receive Ambassadors and other public Ministers.”¹⁴⁴ The Court also noted the President’s functionally exclusive power to negotiate with foreign officials¹⁴⁵ and emphasized the importance of the United States speaking with one voice.¹⁴⁶ If *Zivotofsky I* suggests that the constitutionality of the Boehner-Netanyahu invitation and the Cotton letter are not political questions,¹⁴⁷ *Zivotofsky II* strongly suggests that both would

symptom-of-boehners-grudge-match-against-the-u-s-constitution/; see also Reena Flores, *John Kerry Slams “Unconstitutional” GOP Letter to Iran*, CBS NEWS (Mar. 15, 2015, 9:16 AM), <http://www.cbsnews.com/news/john-kerry-will-not-apologize-for-unconstitutional-gop-letter/>; Peter Spiro, *GOP Iran Letter Might Be Unconstitutional. Is It also Criminal?*, OPINIO JURIS (Mar. 9, 2015, 11:41 AM), <http://opiniojuris.org/2015/03/09/gop-iran-letter-might-be-unconstitutional-is-it-also-criminal/>.

139. U.S. CONST. art. II, § 3.

140. U.S. CONST. art. II, § 2, cl. 2.

141. Logan Act, 18 U.S.C. § 953 (2012).

142. Hassan M. Fattah & Graham Bowley, *Pelosi Meets with Syrian Leader*, N.Y. TIMES (Apr. 4, 2007), http://www.nytimes.com/2007/04/04/world/middleeast/04cnd-pelosi.html?_r=0.

143. Neil A. Lewis, *Wright Has Talks with Both Parties in Nicaragua War*, N.Y. TIMES (Nov. 13, 1987), <http://www.nytimes.com/1987/11/13/world/wright-has-talks-with-both-parties-in-nicaragua-war.html>.

144. U.S. CONST. art. II, § 3; *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2086 (2015).

145. *Zivotofsky II*, 135 S. Ct. at 2086 (“The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”).

146. See *supra* note 123.

147. Finding a plaintiff with standing may still prove difficult in cases like these and may serve as sufficient protection of constitutional ambiguity.

unconstitutionally invade exclusive powers of the President. Whatever one thinks about the wisdom of each of those strategies, it should be clear that eliminating them entirely from the constitutional toolbox would limit, rather than promote, further debate of U.S.-Iran policy. Given the President's effective control over negotiation with Iran and implementation of a deal, it could reduce the space for debate considerably.¹⁴⁸

Not everyone would read *Zivotofsky II* so broadly, and a future court could always find language in that opinion suggesting more respect for these types of congressional foreign policy-making.¹⁴⁹ The point though is that after *Zivotofsky I* and *II*, a judicial decision foreclosing these tactics is a serious possibility. Nothing in current doctrine would guarantee that a court wouldn't resolve such disputes in exactly that way. If that sort of political space is to be guaranteed, some other doctrine is needed. And even if disputes precisely like these never made it to the courts—perhaps for lack of plaintiffs with standing—*Zivotofsky I* and *II* narrow the space for constitutional disagreements over the invitation. Future cases applying *Zivotofsky II* might continue to expand the President's exclusive powers to communicate U.S. foreign policy. Eventually, the constitutional argument in favor of an invitation by the Speaker to address Congress or a letter by groups of Senators, unauthorized by the Executive Branch, may seem difficult or implausible enough to make such an invitation or letter too politically risky to extend or send.

b. Congressional regulation of war

In 1973, Congress passed the War Powers Resolution (“WPR”) over the President's veto.¹⁵⁰ The WPR creates a series of reporting and procedural

148. Of course, in this case, Congress's relatively small role in the debate was largely its own doing, first by delegating so much control over the sanctions regime to the President and in so doing, creating a supermajority requirement to enact new sanctions over the President's veto, and second, by seemingly conceding that the deal need not take the form of an Article II treaty requiring Senate approval. Broad delegations to the Executive are the modern reality, however, and courts must weigh the effects of judicial decisions with it in mind.

149. See Ryan Scoville, *Legislative Diplomacy After Zivotofsky*, LAWFARE (June 15, 2015, 9:00 AM), <https://www.lawfareblog.com/legislative-diplomacy-after-zivotofsky> (explaining how the constitutionality of both the Boehner-Netanyahu invitation and the Cotton letter could be squared with the Court's opinion in *Zivotofsky II*); see also Michael C. Dorf, *Zivotofsky may Be Remembered as Limiting Exclusive Presidential Power*, DORF ON LAW (June 8, 2015, 12:52 PM), <http://www.dorfonlaw.org/2015/06/zivotofsky-may-be-remembered-as.html>. *But see* Goldsmith, *supra* note 11, at 132 (“The problem with this potentially limiting formalist principle is that *Zivotofsky II* did not apply it.”).

150. 50 U.S.C. §§ 1541–1548 (2012).

requirements designed to “insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”¹⁵¹ Among other things, it requires Presidents to report to Congress within forty-eight hours when U.S. Armed Forces are introduced “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”¹⁵² The WPR further requires Congressional authorization for armed forces to remain beyond sixty days and forbids implying authorization from appropriations bills and U.S. treaties.¹⁵³ Since the WPR’s passage, Congress and the President have fallen into a rough constitutional settlement over its application. No President has accepted the constitutionality of the WPR, but despite some notable exceptions,¹⁵⁴ Presidents have complied with its procedural requirements.

The rough constitutional settlement between the President and Congress has not been maintained through the judicial review. When courts have considered claimed violations of the WPR, they have dismissed the claims as nonjusticiable political questions because the war powers were textually committed to the President and Congress,¹⁵⁵ because resolution of the claim would require fact-finding beyond the court’s capacity,¹⁵⁶ because terms like “hostilities” lack judicially manageable standards,¹⁵⁷ or because judicial involvement might risk embarrassment for the United States or its ability to speak with one voice in relations with other states.¹⁵⁸ Instead, the rough constitutional settlement has been maintained by politics.¹⁵⁹

151. *Id.* § 1541(a).

152. *Id.* §§ 1542, 1543(a).

153. *Id.* § 1544(b).

154. *See, e.g.*, Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html>.

155. *See Ange v. Bush*, 752 F. Supp. 509, 511–15 (D.D.C. 1990) (stating, among other things, that “the Constitution appears to grant the executive and legislative branches certain powers which either directly or indirectly affect the conduct of foreign affairs . . .”).

156. *See Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

157. *See Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring).

158. *Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987).

159. The importance of political control seems apparent in the debates over the intervention in Libya and its aftermath. President Obama’s failure to report to Congress sixty days after the start of U.S. military involvement and subsequent administration attempts at justification were subjected to considerable criticism. *See, e.g.*, Savage & Landler, *supra* note 154. While that criticism seems to have done little with regard to U.S. involvement in Libya, it does seem to have an effect on later justifications for the United States’ conflict with the Islamic State in Iraq and Syria (ISIS). Concerns about the WPR’s sixty-day clock seem to have played a role in the administration’s decision to justify military action as already authorized by Congress in prior

That settlement over the WPR seems upended by *Zivotofsky I*. Under the logic of *Zivotofsky I*, only military policy questions themselves would raise political questions requiring judicial abstention. Thus, whether the use of force was desirable, perhaps whether the actions on the ground amounted to hostilities, or even whether a particular enemy fell within the scope of a prior authorization might be questions best left for Congress or the President. The threshold question though, whether Congress could impose these requirements and constraints on the President would be, according to *Zivotofsky I*, a constitutional question—one the courts would be required to decide. By itself, that result might be one critics of the broad post-*Baker* political question doctrine might applaud.¹⁶⁰

But *Zivotofsky II* might give those same critics of abstention in WPR cases some pause. Justice Kennedy's logic with regard to an expansive, exclusive presidential recognition power seems equally applicable to the President's powers as Commander-in-Chief. As with recognition, Congress may have powers to influence the conduct of war—the power to declare war, to make rules and regulations for the military, to grant letters of marque and reprisal, to make rules regarding captures¹⁶¹—but only the President can bring them into effect and the President remains necessary to send and direct troops in battle. Under the logic of *Zivotofsky II*, some congressional regulations, particularly those dealing with the direction of troops and tactics, would seem preempted by the “exclusive” presidential Commander-in-Chief power. Perhaps the WPR's reporting requirements would survive. Other requirements, including removing troops in the absence of Congressional authorization after sixty-days, seem likely to fail. And while Presidents have long-claimed that such requirements were unconstitutional, the absence of any court decision so holding left Presidents uncertain how the public might react if they ignored it entirely. Arguably, the requirements to withdraw acted as an incentive for Presidents to comply with other aspects of the WPR, like the reporting requirement. A judicial decision disabling the withdrawal

authorizations to use force against Al Qaeda and Iraq. See, e.g., Ed O'Keefe & Paul Kane, *House Approves Obama's Iraq-Syria Military Strategy Amid Skepticism*, WASH. POST (Sept. 17, 2014), https://www.washingtonpost.com/politics/congress-poised-to-approve-obamas-iraq-syria-military-strategy-amid-skepticism/2014/09/17/c2494df2-3e85-11e4-b0ea-8141703bbf6f_story.html.

160. In fact, criticism of the courts' abstention in WPR cases has been a key driver of many of the political question doctrine's critics. See generally Thomas M. Franck, *Courts and Foreign Policy*, 83 FOREIGN POL'Y 66 (1991) (criticizing the court in *Lowry v. Reagan*, 676 F. Supp. 333 (D. D.C. 1987); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989) (same).

161. U.S. CONST. art. I, § 8.

requirement might upend the balance, taking a political tool away from Congress, and giving the President little reason to comply with the reporting requirements as well (even if they were held valid).

And the WPR is just one example of a regulation that might be ripe for review. In its debates over an authorization for use of force against the Islamic State of Iraq and Syria (ISIS), Congress has considered both time-limits and the prohibition of ground forces.¹⁶² Both look suspect after *Zivotofsky I* and *II*. Restrictions on geography too might tread too close to the President's exclusive power to direct troops against the enemy.

c. Executive agreements

Although the Constitution only describes one process, in Article II, for making binding international commitments—namely that the President negotiates treaties, and if two-thirds of the Senate agree, the President ratifies them on the United States' behalf¹⁶³—other processes have long been used, including Congressional-Executive Agreements (CEAs), whereby both houses of Congress approve a treaty by majority vote, and Sole Executive Agreements made on the President's own authority. And over time, the importance of these other processes has increased dramatically, as the number of CEAs and Sole Executive Agreements has come to dwarf the number of Article II treaties¹⁶⁴ and as the ranks of CEAs have come to include most significant economic agreements, including the North American Free Trade Agreement (NAFTA) and commitments to the World Trade Organization.¹⁶⁵

The courts, for their part, have long treated the scope of these options as a non-justiciable political question. In the case of NAFTA, for example, the Eleventh Circuit Court of Appeals held that “with respect to international commercial agreements such as NAFTA, the question of just what constitutes a ‘treaty’ requiring Senate ratification presents a nonjusticiable political question.”¹⁶⁶ That court, applying *Baker*, reasoned that the Constitution granted broad powers over foreign relations, that the choice between different

162. Jeremy W. Peters, *Obama to Seek War Power Bill From Congress, to Fight ISIS*, N.Y. TIMES (Feb. 10, 2015), http://www.nytimes.com/2015/02/11/us/obama-to-seek-war-power-bill-from-congress-to-fight-isis.html?_r=0.

163. U.S. CONST. art. II, § 2, cl. 2.

164. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1258, 1260 (2008) (surveying the number of treaties entered into, versus the number of CEAs concluded, between 1980 and 2000).

165. *Id.* at 1247.

166. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001).

types of agreement was beyond the court's expertise, and that a decision against the government risked finality, failed to give the other branches due respect, and threatened to embarrass the United States in the eyes of the world—in other words, a standard post-*Baker* foreign-affairs political-question decision.¹⁶⁷

In the absence of judicial review, as in the areas described above,¹⁶⁸ it has been left to politics and the branches themselves to work out the contours of each category of agreement. Congress passed the Case-Zablocki Act,¹⁶⁹ which requires the Executive branch to report agreements to it, as a guarantee that regardless of form, Congress would remain informed. And in certain instances, the Senate has pushed back (sometimes successfully) against the President's choices, demanding that arms control agreements go through the Article II treaty process¹⁷⁰ or that certain Sole Executive Agreements get Senate approval.¹⁷¹ In general, the political branches seem to have reached a rough settlement that while CEAs can be used for economic treaties, the Article II process must be used for arms control, human rights, and extradition treaties.¹⁷²

Zivotofsky I, by narrowing the application of the first two *Baker* factors and marginalizing the other four, suggests that the constitutionality of and boundaries between these types of international agreements may be ripe for review.¹⁷³ Again, the threshold question is what process is required to bind

167. *Id.* at 1311–19.

168. *See supra* notes 135–162.

169. 1 U.S.C. § 112b (2012).

170. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 374 (5th ed. 2014).

171. *See* Bruce Ackerman & Oona A. Hathaway, *Bush's Final Illusion*, SLATE (Oct. 21, 2008, 4:25 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/10/bushs_final_illusion.html; Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST (Mar. 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>; Oona A. Hathaway & Amy Kapczynski, *Going it Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL INSIGHTS (Aug. 24, 2011), <https://www.asil.org/insights/volume/15/issue/23/going-it-alone-anti-counterfeiting-trade-agreement-sole-executive>.

172. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 996–1002 (2001).

173. *See* Peter J. Spiro, *Are Sole Executive Agreements Next on the Roberts Court Chopping Block?*, OPINIO JURIS (May 8, 2014, 12:25 PM), <http://opiniojuris.org/2014/05/08/sole-executive-agreements-next-roberts-court-chopping-block/>. Notably, there has already been talk of lawsuits to challenge the constitutionality of the process behind the Iran-Nuclear deal. *See* John Yoo, *Why Obama's Executive Action on Iran Does Not Violate the Law*, NAT'L REV. (July 26, 2015, 6:01 PM), <http://www.nationalreview.com/article/421621/why-obamas-executive-action-iran-does->

the United States internationally. *Zivotofsky I* echoed Justice Powell's and Justice Brennan's decisions in *Goldwater v. Carter* on the treaty power that such threshold questions were constitutional questions for the courts rather than political questions for the other branches.¹⁷⁴ But while some scrutiny and definition from the courts may improve the treaty-making process by guaranteeing more voices could be heard in the debate, *Zivotofsky II* reminds us that the doctrinal question may not be answered that way and that a decision on the merits could either eliminate some of these categories completely (at least for some subjects) or broadly validate them. Either possibility could eliminate voices from the debate entirely: A stricter rule favoring Article II treaties over CEAs would remove the House of Representatives and national majorities from the debate, making some agreements with majority national support, but not that of two-thirds of Senators (for example, NAFTA¹⁷⁵), impossible. A stricter rule against Sole Executive Agreements would limit the President's, and, in turn, the general electorate's, voice. The threat of a Sole Executive Agreement can be a powerful tool to force Congress to negotiate over issues that might be of general national concern. Recognition of a broader grant of Presidential power to choose the type of agreement, including a Sole Executive agreement, could eliminate the voices represented by Congress. The current constitutional compromise creates a complex, imperfect, but dynamic dialogue between and across the political branches on international agreements. If the courts simplify it, they may also destroy its vibrancy.

3. Toward Pluralism?

The effects of *Zivotofsky I* and *II* on the three examples above, (1) congressional interactions with foreign leaders, (2) congressional limitations of the use of the military, including the War Powers Resolution, and (3) Executive agreements, suggest the need for a doctrine capable of protecting the channels for political debate. If the concern with the political question doctrine post-*Baker* was that it eliminated debate by hiding government actions from scrutiny, the concern post-*Zivotofsky I* and *II* is that it may

not-violate-law-john-yoo. So, a politically-charged challenge to the process of making international agreements may not be far-fetched.

174. See *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1425 (2012); see also *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring); *Id.* at 1006–07 (Brennan, J., dissenting).

175. See *H.R. 3450 (103rd): North American Free Trade Agreement Implementation Act*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/103-1993/h575> (last visited Jan. 4, 2017) (showing that NAFTA was passed by a simple majority by a vote of 234 to 200).

eliminate debate by limiting the entry-points for substantive political debate altogether. This Article proposes a new, pluralist or politics-reinforcing political question doctrine to protect the space for congressional-Presidential disagreement.

But how worrisome are these possibilities really? Do we really need a new political question doctrine to solve them? One answer to these concerns is that the Court rarely decides such cases, first because they are rarely so neatly constructed, with Congress and the President so clearly on opposite sides,¹⁷⁶ and second because discretionary certiorari and the difficulty of finding plaintiffs with standing in separation-of-powers cases make at least Supreme Court decisions in such cases unlikely. If we imagine the risk of a branch-power-enhancing decision in a separation of powers case as 50% (we could, of course, imagine many other possibilities), such decisions should be rare. Perhaps we should worry more about the *certainty* of leaving the political branches beyond scrutiny entirely through a political question doctrine, than the *potentiality* of insulating them through decisions on the scope of constitutional powers.

It is unclear exactly how much of a threat to scrutiny, debate, and dissent each possibility entails. The above might be a fair response to that uncertainty. There are a few reasons though to be less confident in the post-*Zivotofsky* status quo. First, with the rise of the administrative state, it may not actually be the case that standing for separation of powers cases is always so rare. As *Noel Canning*¹⁷⁷ demonstrates, individuals may now be affected by separation of powers questions in ways that give rise to standing. Second, even if the decisions are rare, they can have impact in the separation of powers context well-beyond their specific application. Because of the paucity of cases answering separation of powers questions, particularly in the field of foreign affairs, it has generally been left to the Office of Legal Counsel (OLC) to opine for the Executive branch on the meaning of those cases; and, by all accounts, the OLC has expanded the scope of precedents supporting exclusive, unreviewable Executive power. Even if the Court never again decided a key separation of powers case, *Zivotofsky II* would undoubtedly stand in future OLC memoranda for a range of exclusive Executive Branch powers, many well beyond the recognition context of *Zivotofsky II* itself.¹⁷⁸

176. See *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2113 (2015) (Roberts, C.J., dissenting).

177. *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014).

178. See Harlan Grant Cohen, *Zivotofsky II's Two Visions for Foreign Relations Law*, 109 *AJIL UNBOUND* 10 (2015); Goldsmith, *supra* note 11, at 133–46; Jack Goldsmith, *Why Zivotofsky*

And while Congress may be less able to expand the boundaries of decisions recognizing congressional exclusivity—the President may be better situated to respond quickly and aggressively to congressional power-grabs than the other way around—it may be able to do so in some cases. The Senate has, for example, successfully pushed back on the President’s attempt to ratify major arms control agreements as CEAs rather than Article II treaties requiring the Senate’s advice and consent.¹⁷⁹ But, finally, even if the risks of such branch-power-enhancing decisions are at any given time small, they are much more permanent. When courts choose to avoid a question because of the political question doctrine, they *do* insulate it from *judicial* scrutiny. They *do not* insulate it from *all* scrutiny though; having left the constitutional question undecided, the political branches themselves, the media, and the public can still argue about the constitutionality of each branch’s actions—as they have in cases that have avoided review, like torture¹⁸⁰ and targeted killing.¹⁸¹ At the extremes, the President can refuse to execute laws he deems unconstitutional, and Congress can threaten impeachment if it believes the President has acted illegally. And depending on how the courts initially avoided the case, they may have done nothing to preclude courts from deciding the question on some future occasion.

III. REDISCOVERING A POLITICS-REINFORCING POLITICAL QUESTION DOCTRINE

This Part develops a different political question doctrine from prior ones—a pluralist, or politics-reinforcing political question doctrine designed, not to protect government decisions from judicial scrutiny, but instead to protect the channels for democratic debate. It is a political question doctrine designed to foster robust debate rather than eliminate it. Part A follows a variety of paths suggesting the courts should be careful to protect and nurture the space for political debate in the system of governance. Part B develops a politics-

Is a Significant Victory for the Executive Branch, LAWFARE (June 8, 2015, 3:44 PM), <https://www.lawfareblog.com/why-zivotofsky-significant-victory-executive-branch>.

179. See BRADLEY & GOLDSMITH, *supra* note 170, at 374.

180. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)) (prohibiting inhumane interrogation techniques).

181. Compare *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46 (D.D.C. 2011) (rejecting challenge to inclusion on target list, for, among other reasons, posing a “political question”), with Charlie Savage, *Senators Press Holder on Use of Military Force*, N.Y. TIMES (Mar. 6, 2013), <http://www.nytimes.com/2013/03/07/us/politics/senators-press-holder-on-use-of-military-force-on-us-soil.html> (describing congressional frustration with the Obama administration over targeted drone strikes).

reinforcing political question doctrine that can give doctrinal force to those principles.

A. Pluralist Clues

The politics-reinforcing political question doctrine can be found at the intersection of three paths of constitutional thought: (1) structural arguments that the Constitution and the institutions it creates are designed to guarantee that different voices, different parts of the electorate, will be heard in public policy debates; (2) arguments that judicial review is designed to monitor and maintain the fairness and openness of the political process; and (3) arguments that the courts should be careful in using their power not to stamp out political debate too soon or without strong justification. These paths are not completely separate; they sometimes run in parallel and cross at various points. Each of these paths though eventually leads off in its own direction, in some cases, suggesting more judicial restraint than this Article would support. Reading the three strands of arguments together actually produces a more moderate form of restraint, a politics-reinforcing political question doctrine that incorporates and balances the principles of each. And while the resulting doctrine invokes some of the language of the existing political question doctrine or cases, it will become clear that its underlying logic is quite different.

1. Structural Protections for Debate

The idea that the structure of the government, the separation of powers across three branches and two houses of Congress, and the choice of multiple methods of election and representation is designed to create space for political debate is first visible in the Federalist Papers. Pointing specifically to Federalist Papers numbers 51 and 60, Bruce Ackerman observes: “[t]he brilliant, but paradoxical, way that Publius makes this point is by proliferating the modes of representation governing normal politics.”¹⁸² As Ackerman explains:

In Publian hands, the separation of powers operates as a complex machine which encourages each official to question the extent to which other constitutional officials are successfully representing the People's true political wishes. Thus, while each officeholder will predictably insist that *he* speaks with the authentic accents of the

182. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1028 (1984).

People themselves, representatives in other institutions will typically find it in their interest to deny that their rivals have indeed represented the People in a fully satisfactory way.¹⁸³

In other words, the separation of powers is not just a negative force designed to check the ambitions of any one branch. Fragmenting power between and across the branches is actually designed to positively enhance debate, multiplying the voices that can be heard through each one.¹⁸⁴ The House of Representatives, Senate, and President are elected in different ways from different size electorates. Different interests will be better represented in the more frequent, more local elections to the House, the less frequent, statewide election to the Senate, and the more national elections to the President. With overlapping authority, each one gives some portion of the electorate a chance to be heard in the key debates of the day. The clichéd example is international trade. As the story goes, congress-people, rationally responding to the electoral incentives of frequent, local elections will tend to support protectionist policies that may help local industry at the expense of the broader welfare; the President, elected nationally based on state-wide majorities, is more insulated from those local concerns and will instead favor more liberalized trade if it will benefit national consumers and improve the overall economy.

As Bryan Garsten has argued, “a chief purpose of representative government is to multiply and challenge governmental claims to represent the people.”¹⁸⁵ National, state, and local interests, along with all the varied interests that might be better represented at one level or the other, each have a chance to be heard. None automatically win over the others, and each will

183. *Id.*

184. *See, e.g.*, Issacharoff & Pildes, *supra* note 16, at 712 (“But constitutional ground rules also create relatively stable and nonnegotiable structures that enable political competition to emerge and endure.”). This argument for the separation of powers echoes frequent arguments in favor of federalism. *See, e.g.*, Robert S. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 288–90 (2005) (arguing that federalism encourages regulatory pluralism and, in turn, greater political dialogue over federal and national policies); David C. Williams, *American Constitutional Fantasies: Escape from Difference Through Escape from Government*, 12 IND. J. GLOBAL LEGAL STUD. 415, 418–19 (2005) (explaining that “[f]rom the beginning, our constitution sought to give formal representation to a plurality of different groups, considered as groups,” including through federalism).

185. Bryan Garsten, *Representative Government and Popular Sovereignty*, in *POLITICAL REPRESENTATION* 91 (Ian Shapiro et al. eds., 2009); *see also* ELY, *supra* note 16, at 90 (“I don’t suppose it will surprise anyone to learn that the body of the original Constitution is devoted almost entirely to structure, explaining who among the various actors—federal government, state government, Congress, executive, judiciary—has authority to do what, and going on to fill in a good bit of detail about how these persons are selected and to conduct their business.”).

have to be considered if policies are to be enacted and made effective. “The Constitution’s various moves to break up and counterpoise governmental decision and enforcement authority, not only between the national government and the states but among the three departments of the national government as well,”¹⁸⁶ John Hart Ely explained, guaranteed that “no faction or interest group would constitute a majority capable of exercising control.”¹⁸⁷

And to some observers, history has proven the genius of this model. Surveying the first forty years of U.S. foreign relations, Abraham Sofaer observed that “[t]he legislative and executive branches functioned as separate entities, but with powers over the same matters. Each was jealous of its authority, and at times sought to increase its powers. But, as Hamilton, Madison and others intended, neither branch prevailed consistently enough to subordinate the other.”¹⁸⁸

This idea, that the competition between the branches protects political debate, has sometimes made appearances in decisions rejecting jurisdiction on political question doctrine grounds. Declaring war powers challenges to the first Gulf War to be political questions, Judge Lamberth of the District Court for the District of Columbia, observed that “[t]he various provisions of the Constitution do not grant the war power exclusively to either the legislative or the executive branch. The powers granted to both branches, however, enable those branches to resolve the dispute themselves.”¹⁸⁹ Justice Breyer made a similar argument in his dissent in *Zivotofsky I*, observing that “insofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have nonjudicial methods of working out their differences.”¹⁹⁰ As Justice Breyer explains,

The Executive and Legislative Branches frequently work out disagreements through ongoing contacts and relationships, involving, for example, budget authorizations, confirmation of personnel, committee hearings, and a host of more informal contacts, which, taken together, ensure that, in practice, Members of Congress as well as the President play an important role in the shaping of foreign policy. Indeed, both the Legislative Branch and

186. ELY, *supra* note 16, at 80.

187. *Id.*

188. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS xiv–xv (1976).

189. *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990).

190. *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1441 (2012) (Breyer, J., dissenting).

the Executive Branch typically understand the need to work each with the other in order to create effective foreign policy. In that understanding, those related contacts, and the continuous foreign policy-related relationship lies the possibility of working out the kind of disagreement we see before us.¹⁹¹

And the best exemplar of this argument in political question doctrine scholarship is Jesse Choper, who has argued that courts should treat pure separation-of-powers questions as political questions precisely because the political branches have sufficient tools at their disposal to check each other.¹⁹²

As will be explained later though,¹⁹³ Choper's argument, reflected in these cases, goes too far. The two branches may have the tools to check each other, but they will not always be effective. While there is a strong argument that courts should abstain when the branches are actually checking each other, this Article argues that argument weakens in the face of branch agreement or acquiescence. As will be explained, there are good reasons to worry that the branches will not sufficiently check each other. In those cases, protecting democracy and room for debate counsels judicial intervention rather than abstention.

2. Political Process Protective Judicial Review

This model of democratic competition between and within the political branches has been picked up by a different strand of constitutional thought to help explain, defend, and define the scope of judicial review. Judicial review, the argument goes, is warranted when it is necessary to protect the political process, to guarantee that it is properly giving voice to all. The most

191. *Id.*; see also *Goldwater v. Carter*, 444 U.S. 996, 1006 n.1 (1979) (Rehnquist, J., concurring) (“Moreover, Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters. Under Article I, Section 8 of the Constitution, it can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulates. Congress thus retains a strong influence over the President's conduct in treaty matters.”) (quoting *Goldwater v. Carter*, 617 F.2d 697, 716 (D.C. Cir. 1979) (Wright, C.J., concurring), *vacated by Goldwater*, 444 U.S. 996)).

192. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1466 (2005) (arguing that the judiciary should refrain from adjudicating a matter when “the political branches may be trusted to produce a sound constitutional decision” and that the Executive and Legislative Branches can be trusted with such decisions because of their “competing interests”).

193. See *infra* Part III.B.

prominent advocate of this notion of democracy, or representation-reinforcing judicial review, was John Hart Ely.

Ely built upon *United States v. Carolene Products Co.*'s famous footnote four, in which Justice Stone suggested that "more exacting judicial scrutiny" or "more searching judicial inquiry" might be warranted in cases where legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or targets "particular religious, or national, or racial minorities" and where "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."¹⁹⁴ Partly as a defense of the Warren Court's jurisprudence, Ely argued for a "representation-reinforcing approach to judicial review,"¹⁹⁵ in which the court would police the political process for "malfunctions"¹⁹⁶ rather than accordance with particular values. As Ely explains,

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded to other groups by a representative system.¹⁹⁷

Judicial review, Ely explained, was necessary when "either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interest of those whom the system presupposes they are."¹⁹⁸ "[A] representation-reinforcing approach to judicial review . . . is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy,"¹⁹⁹ and "assigns judges a role they are conspicuously well situated to fill."²⁰⁰

194. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (internal citations omitted).

195. ELY, *supra* note 16, at 88.

196. *Id.* at 103.

197. *Id.*

198. *Id.*

199. *Id.* at 88.

200. *Id.* at 102.

Richard Pildes and Samuel Issacharoff drew from Ely's "antitrust analogy"²⁰¹ to develop a model of "legal oversight over democratic politics."²⁰² "Where courts can discern that existing partisan forces have manipulated these background rules," they argued, "courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment."²⁰³ But the flipside was true as well: when the political process was not malfunctioning, when the mechanisms designed to give voice to different interests were working, judicial review might not be warranted. As Pildes and Issacharoff explain, "[r]ather than seeking to control politics directly through the centralized enforcement of individual rights, we suggest courts would do better to examine the background structure of partisan competition. Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention."²⁰⁴ In much the same vein as this call for a politics-reinforcing political question doctrine, the work of Pildes, Issacharoff, and other related scholars reflected "the aspiration for democracy-reinforcing as opposed to democracy-limiting judicial review."²⁰⁵

3. Judicial Minimalism and Respect for Pluralism

Intersecting with these two paths of constitutional thought is a path devoted to defining the limits of judicial review. The start of this path is usually located in the work of James Bradley Thayer, who argued in a famous 1893 *Harvard Law Review* article that a statute should only be invalidated if its unconstitutionality is "so clear that it is not open to rational question."²⁰⁶ The path from Thayer eventually led through Alexander Bickel, who developed his own conception of and argument for judicial restraint. Bickel believed that the courts play a key role in articulating fundamental values. Judicial review though is in some tension with democratic governance, a tension Bickel coined "the counter-majoritarian difficulty."²⁰⁷ To resolve this tension, Bickel argued that the courts should embrace a type of minimalism

201. Issacharoff & Pildes, *supra* note 16, at 710.

202. *Id.* at 717.

203. *Id.* at 648.

204. *Id.*

205. See Yen-Tu Su, *Retracing Political Antitrust: A Genealogy and Its Lessons*, 27 J.L. & POL. 1, 9 (2011).

206. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

207. BICKEL, *supra* note 18, at 16–23.

and incrementalism that would put them in dialogue with, rather than in opposition to, the political branches. Embracing the “passive virtues” of judicial decision-making and using a variety of techniques to avoid deciding more than they must in particular cases, the courts could avoid overreaching, protect their authority, and enhance the credibility of their pronouncements.²⁰⁸ Among Bickel’s passive virtues are the court’s powers to decline jurisdiction, to avoid issues for lack of ripeness, to decide issues on procedural grounds, and important for the purposes of this article, the political question doctrine.²⁰⁹ The passive virtues are also often associated with the doctrine of constitutional avoidance, which much like a politics-reinforcing political question doctrine counsels against deciding constitutional questions whenever possible.²¹⁰

Much like the politics-reinforcing political question doctrine endorsed here, the passive virtues protect the space for continued democratic debate; Bickel’s justifications for the political question doctrine though is very different from the ones described here. For Bickel, the foundation of the political question doctrine is judicial anxiety—anxiety that the issue in a case is too strange or too momentous and anxiety that the political branches and people will ignore the courts.²¹¹ These are the types of considerations that undergird the prudential factors of the modern post-*Baker* political question doctrine. But they are quite foreign to the politics-reinforcing political question doctrine endorsed here. That doctrine is based not on any incapacity of the judiciary, but in a concern for the health of the political process. The politics-reinforcing political question doctrine sets the courts up as guardians of the political process, capable of intervening or demurring as necessary to maintain the robustness of political debate. When the political process seems broken or in need of a constitutional check, the courts should not shy away from getting involved simply because the issues are difficult or politically charged.

Cass Sunstein has developed a different model of judicial restraint based on “decisional minimalism.”²¹² Sunstein suggests that courts, whenever

208. *Id.* at 111–200.

209. *Id.*

210. Justice Brandeis is credited with having espoused the modern constitutional avoidance doctrine. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

211. BICKEL, *supra* note 18, at 184.

212. SUNSTEIN, *supra* note 18.

possible, decide difficult constitutional cases on as narrow grounds as possible.²¹³ Doing so leaves more room and more time for the issue to be deliberated through politics and within society. As with a politics-reinforcing political question doctrine, Sunstein's minimalism is meant to be "democracy-promoting."²¹⁴ As Sunstein explains, "[m]inimalist courts can provide spurs and prods to promote democratic deliberation itself."²¹⁵ "[D]emocracy-promoting forms of minimalism, designed to promote both accountability and reason-giving, are appropriate and salutary judicial intervention into political domains."²¹⁶

But Sunstein's minimalism differs in two important ways from the type of restraint described here. First, Sunstein's minimalism is substantive. Whereas Bickel's passive virtues or a politics-reinforcing political question doctrine would suggest avoiding the issue raised by the case, Sunstein's minimalism decides the case, but on as narrow ground as possible. Second, Sunstein's minimalism is triggered by the substance of the question before the courts; the case for minimalism is strongest when politically or morally contentious questions are at issue. A politics-reinforcing political question doctrine, on the other hand, is blind to substance. It is instead triggered by the posture of the political branches to one another and the relative openness of the channels of political debate. A politics-reinforcing political question doctrine is thus much narrower than Sunstein's minimalism; it is only triggered in a small subset of cases in which the political branches are arguing with each other. Whether a much broader form of democracy-promoting minimalism like Sunstein's is desirable is well beyond the scope of this Article.

A third, different form of judicial restraint can be gleaned from the work of Robert Cover.²¹⁷ Rather than judicial minimalism, Cover's suggestion might better be described as judicial responsibility. Cover describes the ways in which the law is constantly being understood and developed within the communities who live by and with it. Those communities are, for Cover, "jurisgenerative."²¹⁸ They develop accounts of the law's meaning, how the law applies, and how it should be interpreted that help explain how and why their members should live within it.²¹⁹ But whereas narratives of the law

213. *Id.* at 3.

214. *Id.* at 26–27.

215. *Id.* at 27.

216. *Id.* at 28.

217. Cover, *supra* note 15.

218. *Id.* at 15.

219. *Id.* at 46 ("Those narratives also provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law.").

flower within these communities, in front of courts, those narratives are threatened. Jurisdiction, the power to say what the law is, gives courts the power of jurispathy, the power to kill off all narratives of the law but the one they adopt.²²⁰ For Cover, wielding this legal executioner's axe is a grave responsibility, one courts must use responsibly. As such, when courts decide to invalidate one community's understanding of the law, they carry special burdens of justification. As with the political question doctrine endorsed by this Article, Cover favors a form of legal and political pluralism in which differing views of law and policy should be encouraged and nurtured, in which choosing one interpretation and excluding others requires strong justification.

B. Finding a Politics-Reinforcing Political Question Doctrine

The case for a politics-reinforcing political question doctrine emerges from these three broad strains of constitutional thought. A politics-reinforcing political question doctrine explains when and how a court should exercise restraint in order to protect the space for substantive political debate.

Discussions of the Constitution's structural protections of debate describe a complex engine of democratic deliberation maintained by the Constitution's plural overlapping sources of authority. For a politics-reinforcing political question doctrine, contestation between the branches over overlapping claims of authority is not a constitutional bug to be fixed, but a structural feature of the Constitution designed to guarantee access to the widest range of voices on the public policies of the day.

The courts' role in maintaining those structures is inspired by theories of representation-reinforcing judicial review. In suggesting that courts should intervene when the channels of deliberation and representation are malfunctioning, these theories also suggest that courts should be more reticent when those channels are acting properly. A politics-reinforcing political question doctrine thus teaches that where the political branches are properly giving voice to different part of the electorate with different interests, courts should be much warier to cut those debates off. And delineating the exact boundaries between congressional and presidential power can do exactly that, as the Court's decision in *Zivotofsky II* demonstrates.

But representation-reinforcing judicial review also helps define a politics-reinforcing political question doctrine's limits. Whereas the modern, post-*Baker* political question doctrine has often been assumed to support

220. *Id.* at 40–42.

abstention most powerfully in cases where the President and Congress are aligned, a politics-reinforcing political question doctrine suggests the opposite. The point of a politics-reinforcing political question doctrine is not to protect the products of the political process from review or dissent, but to protect the robustness of the political process. And where the two political branches are aligned, a court becomes the only branch that can check to make sure voices haven't been improperly silenced and that debate hasn't been prematurely shut down. And we have good reason to worry about malfunctions when the political branches agree. As Ely and Justice Stone suggested, minority voices may have insufficient protection in the political process; particularly in foreign affairs and national security, the interests of ethnic minorities may be too easily brushed aside by fear or anger—a problem evidenced both in the infamous internment of Japanese-Americans during World War II and roundups of the Muslims after September 11, 2001. But, as David Moore has argued,²²¹ we also have reasons to question whether Congress and the President will always serve as adequate checks on each other. Presidents and members of Congress may identify more with their political parties than with their respective branches or constituencies.²²² We might thus worry that the political branches will too quickly find common cause when controlled by the same political party. Beyond that, foreign policy's relative obscurity to much of the American public may make such partisan-promoting agreements more likely.²²³ We might also worry that members of Congress lack proper incentives to disagree with the President even when members of their constituencies might wish they would. Particularly with regard to foreign affairs and national security, success may be very hard to demonstrate. Failure though may be much clearer. Particularly for representatives elected every two years, there may be little electoral value in owning foreign policy positions.²²⁴ Better to leave those to the President (who may be unable to avoid them) and focus on the sort of bread-and-butter issues likely to be more salient to their much smaller, more localized constituencies. And the President's first-mover advantage in

221. See David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1027–40 (2010).

222. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315–16, 2323, 2326–27, 2329–30, 2336–42, 2351–52 (2006); Moore, *supra* note 221, at 1029.

223. See Moore, *supra* note 221, at 1038–39; see also Jide Nzelibe, *Our Partisan Foreign Affairs Constitution*, 97 MINN. L. REV. 838, 905 (2013).

224. See Moore, *supra* note 221, at 1031–33.

foreign and national security affairs may make it hard politically for Congress to serve as a check. It may be very difficult, for example, for Congress to use its powers over the purse to defund an armed conflict already in progress.²²⁵

All of these concerns suggest that where the two branches are in agreement, the arguments for a politics-reinforcing political question doctrine disappear. Judicial intervention becomes necessary to guarantee that the political branches have not improperly shut voices out.

It is in this sense that Jesse Choper's argument is only half-right. Congress and the President have the tools to check each other, but we have good reason to believe that they are often unwilling or unable to use them. When that's the case, the courts should intervene to at least make sure that the gears of democracy haven't broken or gotten stuck. The same would be true if using their respective tools, Congress or the President is unable to protect individual rights. But when Congress and the President *are* fending for themselves, *are* checking each other, the politics-reinforcing political question doctrine suggests courts should allow them to do so.

Finally, from theories of judicial restraint and pluralism, a politics-reinforcing political question doctrine draws a commitment to minimalism in separation of powers cases. In some cases, particularly where important individual rights are at issue, courts may need to decide disputes between the branches. Standing in opposition to all of the arguments here for forbearance are *Marbury*'s other famous admonitions, "that where there is a legal right, there is also a legal remedy,"²²⁶ and that "[i]t is emphatically the province and duty of the judicial department to say what the law is."²²⁷ The courts have long had an implicit exception to the political question doctrine for claims

225. See, e.g., Steve Huntley, "Toothless" Congress Resolution Might End Up Having Real Bite, CHI. SUN-TIMES, Feb. 16, 2007, at 41 (describing Congressional attempt to voice displeasure with the war in Iraq); Michael Abramowitz, *Bush, Congress Could Face Confrontation on Issue of War Powers*, WASH. POST (Feb. 16, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/15/AR2007021501703.html> ("Democrats have described these conditions as part of a slow strategy to stop the war without cutting funding completely, which most parties agree would be legally permissible—but politically difficult."); Anne Flaherty, *House Members Joust over Iraq War Policy*, EXPRESS GROUP (Feb. 13, 2007), <http://archive.indianexpress.com/news/house-members-joust-over-iraq-war-policy-/23284/> (describing Congressional attempt to voice displeasure with the war in Iraq); James M. Lindsay, *Is Operation Odyssey Dawn Constitutional? Part V*, COUNCIL ON FOREIGN RELS. (Apr. 5, 2011), <http://blogs.cfr.org/lindsay/2011/04/05/is-operation-odyssey-dawn-constitutional-part-v/> ("Congress can stop the president only by passing a law that commands him to do so. But that law is subject to a presidential veto.").

226. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (internal quotations omitted) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

227. *Id.* at 177.

regarding important individual rights,²²⁸ an exception a politics-reinforcing political question doctrine should share and make explicit. But when a court must decide such a case, a politics-reinforcing political question doctrine counsels that the court decide the separation-of-powers question in as minimalist a manner as possible, only delineating the lines between Congress and the President as much as necessary to decide the individual rights claim. Courts should be highly cognizant not to inadvertently eliminate the space that overlapping congressional and presidential claims of authority create for future substantive policy debates.

As Part IV will explain, the strands of constitutional thought that come together in a politics-reinforcing political question doctrine help define its application to specific cases. As that Part will unpack through the examples of *Youngstown*, *Zivotofsky*, and *Boumediene*, a court faced with a separation-of-powers question invokes the politics-reinforcing political question doctrine only when the two branches are opposed and only where both political branches can make prima facie claims to have constitutional authority over the issue. Once those circumstances are established, a court must weigh the importance of any individual right claimed against the value of leaving separation-of-powers questions open. If the claimed right is important enough to require the court to exercise jurisdiction, the court should adopt as minimalist a decision as possible to vindicate the right, leaving maximal room for future political branch contestation.

C. *Rescuing a Politics-Reinforcing Political Question Doctrine from the Shadows of Baker and Youngstown*

Given the importance that encouraging, or at least not quashing, democratic deliberation plays within other areas of constitutional law, why haven't these concerns so far come to the fore in judicial and scholarly discussions of the political question doctrine? There are a few possible explanations for the blindspot. First, *Baker* and its six factors have served as the starting point for discussions of the political question doctrine and have dominated debates over its scope and application. But those factors provide little space for concerns about political pluralism and robust political debate. On the contrary, the *Baker* factors are in many ways about when to use the political question doctrine to mute or quash political debate. Concerns about

228. See Nzelibe, *supra* note 99, at 1006 (writing of foreign relations and national security cases in which the courts have intervened to protect individual rights that “[a]ll these cases may be understood to hold that the courts have an obligation to adjudicate on foreign affairs issues that involve individual rights claims”).

second-guessing policy decisions, about embarrassing the United States, about undermining the finality of government decisions, about speaking with one voice as a nation reflected in *Baker*'s factors are arguments to cut off debate, to avoid reopening questions. As a result, arguments for or against a broad political question doctrine have assumed that a broad political question doctrine would close off debate while a narrow one would open it up. Advocates for more deliberation have thus generally opposed the political question doctrine. *Zivotofsky I* though demonstrates that these assumptions were mistaken. A narrow political question doctrine, when coupled with broad understandings of one or the other branch's powers, can actually silence debate, by cutting one branch out of the discussion and, with that branch, those voices and interests who are better represented there.

Second, debates over the political question doctrine have rarely focused on cases in which Congress and the President are actually opposed. As the Court in *Zivotofsky II* made clear, such cases are relatively rare.²²⁹ In fact, there seems to be an underlying assumption in both the decisions and literature that the political question doctrine would be least applicable in such cases, that on the contrary, where the two branches are in conflict, the courts have a duty to answer the question.²³⁰ This assumption is clearly influenced by the focus on *Baker*'s factors. Where the two branches are in disagreement, it is harder to show that the decision has been committed to one branch or the other, and the risk that judicial scrutiny would lead to embarrassment, undermine finality, or risk the United States speaking with one voice all seem slight. The other two branches are already accomplishing those. But this assumption also reveals the shadow of *Youngstown* and Justice Jackson's famous tripartite analysis of separation of powers questions. According to Justice Jackson's framework, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."²³¹ Under such circumstances, "Presidential claim to a power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."²³² Many seemed to have read this powerful precedent as an implicit gloss on the political question doctrine, suggesting not only a method for analyzing presidential-congressional conflicts, but as a call for courts to exert jurisdiction over that category of disputes. The extraordinary power of that parallel precedent,

229. See *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2113 (2015) (Roberts, C.J., dissenting).

230. See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987).

231. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

232. *Id.* at 638.

though, seems to have obscured the potential costs to the democratic process of deciding those disputes. The next Part will consider the relationship between a politics-reinforcing political question doctrine and *Youngstown* in greater depth.

Third, the potential for the political question doctrine to protect and promote political debate has been obscured by questions about whether the existing doctrine is a constitutional requirement, disabling the courts from answering certain questions or a prudential doctrine used by courts to manage relations with the other branches. As concerns have risen that the courts have used the political question doctrine to abdicate their duty and avoid deciding hard cases, critics have emphasized the narrower, more constitutional aspects of the doctrine, specifically the first two *Baker* factors, and sought to limit the effect of the more prudential ones reflected in the final four. This is clearly part of the majority's project in *Zivotofsky I*, in which the first two factors are discussed and the others disappear, a move that pushed Justice Sotomayor to write a concurrence defending the more prudential aspects of the doctrine.²³³ This perceived tension between encouraging debate and prudential considerations has driven a wedge between the political question doctrine and other democracy-reinforcing doctrines or techniques like the doctrine of constitutional avoidance, ripeness and mootness, and judicial minimalism, all of which encourage the courts to engage in prudential decision-making. A politics-reinforcing political question doctrine is a prudential doctrine, but one designed to encourage rather than silence political debate.²³⁴

Finally, the modern political question doctrine focuses on the courts' institutional weakness—a broad political question doctrine assumes the courts lack the information, expertise, legitimacy, or authority to make certain constitutional decisions. Those who disagree push back. But a politics-reinforcing political question doctrine is different. It assumes strong, knowledgeable courts, which can decide how best to promote debate over

233. *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1433–43 (2012) (Sotomayor, J., concurring).

234. Decisions regarding the political question since *Baker* have evinced considerable confusion whether the doctrine presented constitutional limitations on judicial action, prudential consideration a court could or should consider, some combination of the two, or the former informed by the latter. A politics-reinforcing political question doctrine would be a prudential doctrine, but one with constitutional underpinning in separation of powers. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (explaining that although the Act of State doctrine is not constitutionally required it does have “‘constitutional’ underpinnings” and “arises out of the basic relationships between branches of government in a system of separation of powers”). Unlike previous incarnations of the political question doctrine, it is concerned less about maintaining separation of powers between the courts and political branches and more about maintaining separation of powers between the political branches themselves.

issues and protect voices that may need certain avenues to be heard. It assumes courts are able to weigh when the political branches are providing those avenues, and that they should stay back when they are not, and the courts need to provide the room needed for dissent.

IV. A POLITICS-REINFORCING POLITICAL QUESTION DOCTRINE IN ACTION

So how would a politics-reinforcing political question doctrine actually work? The political question doctrine described here is designed to be politics-reinforcing. It counsels judicial forbearance when deciding too much in one case might limit the opportunities for debates on different subjects in the future. The contested, overlapping boundaries of congressional and presidential power create opportunities for substantive policy debates. A politics-reinforcing political question doctrine suggests treading lightly over that territory, exercising restraint when the political branches are in disagreement and where resolving their substantive policy disputes might resolve their broader constitutional suits as well.

But a politics-reinforcing political question doctrine is not meant to immunize government actions from scrutiny, nor to sanction judicial abdication. Pushing up against any doctrine of judicial restraint is *Marbury*'s admonition "it is emphatically the province and duty of the judicial department to say what the law is."²³⁵ This has long been interpreted to require U.S. courts to decide cases when they have jurisdiction, and it is important, as described in the prior Part, not to allow courts to simply duck cases they do not like, are afraid to get wrong, or that they feel will get them into trouble. This requirement to decide justiciable cases, though, has most often been honored in the breach. A range of doctrines softens its hard edges, allowing or encouraging courts to avoid deciding certain questions through the canon of constitutional avoidance, the act of state doctrine, the state secret privilege, forum non-conveniens, and comity, among others. The Supreme Court, of course, uses its discretion over whether to grant writs of certiorari to tailor its own docket. Moreover, the category of "justiciable" cases is hardly self-defining. Standing, mootness, and ripeness have all been understood more expansively or more restrictively over time. Decisions on the scope of those justiciability doctrines necessarily take normative concerns over whether to decide a case into account. What all of this means is that normative questions concerning whether courts should hear or decide certain disputes are unavoidable. The best we can do is to keep the opposing concerns

235. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

constantly in mind, including the importance of guaranteeing that “where there is a legal right, there is also a legal remedy.”²³⁶ It is for that reason that a politics-reinforcing political question doctrine must take the vindication of individual rights seriously in analyzing when and how courts should intervene in disputes between the branches.

All of this requires careful balancing that the politics-reinforcing political question incorporates through a two-step inquiry. Step one requires a determination whether, in any given case, the politics-reinforcing political question doctrine is applicable at all. This step involves two inquiries: first, whether the two political branches are in opposition²³⁷ and thus themselves giving voice to different views among the public, and second, whether each branch can make a reasonable prima facie case that it has independent authority to set policy on that issue. If either of those threshold tests is not met, the politics-reinforcing political question doctrine is inapplicable. If the politics-reinforcing political question doctrine is applicable, step two requires a determination whether judicial intervention is nonetheless necessary to respond to a potential violation of an important right. This step requires weighing the importance of the claim raised in a case against the importance of keeping the channels of political debate open. As explained below, it is separate inquiry from standing; it comes up only if the requirements for standing are already met. If a court decides in step two that it must decide a plaintiff’s claim, the politics-reinforcing political question doctrine focus shifts from abstention to minimalism, counseling a court to decide the rights claim as narrowly as possible with regard to separation-of-powers (it might be broad with regard to the right, for example), so as to protect the space for future debates.²³⁸ As will be explained below, sometimes deciding a claim will not allow for a narrow separation-of-powers holding.

236. *Id.* at 163 (internal quotations omitted) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

237. Of course, as debates over the *Youngstown* categories have demonstrated, deciding whether the President and Congress are aligned or in opposition can be more art than science. Not everyone would agree with how Justice Stevens or Chief Justice Roberts categorized the situations in *Hamdan* or *Medellin*, for example. What the politics-reinforcing political question doctrine sets up is an ideal type that acts as principle for its application. The real question is whether the political channels of debate are continuing to actively provide voice to disagreements within the public.

238. The step-two analysis resembles the approach Jide Nzelibe develops as part of his balance of institutional competencies model of the political question doctrine, in which courts balance foreign policy concerns against individual rights claims, and shift from abstention to political branch deference when important individual rights are at stake. *See* Nzelibe, *supra* note 99, at 1005–06.

Each of these inquiries requires judgment and one might ask whether the courts are best situated to make these decisions well. But unlike some of the substantive questions the courts might be asked to answer in the absence of a politics-reinforcing political question doctrine—for example, whether a notation in a passport will be seen by foreign powers as an act of recognition—questions on which the courts might arguably have less expertise than the political branches, these inquiries focus courts on question well-within their usual wheelhouse—questions of fair and robust process, individual rights, and the outer-boundaries of constitutional powers.²³⁹ Rather than interposing themselves between the political branches on policy questions, the courts are asked to guarantee a fair state of play between them, the openness of those branches’ debates to different voices within the political community, and protection of individuals or minorities against majoritarian decision-making. These types of questions are not easy for courts, but courts are certainly better situated to answer them than political branches who may not be interested in enhancing the voices of others at the potential expense of their own or those of their favored constituents.

The politics-reinforcing political question doctrine’s two-step inquiry and its components can be better understood with reference to real cases. As such, the rest of this section uses three iconic cases, *Youngstown*, *Zivotofsky*, and *Boumediene* to show how a politics-reinforcing political question doctrine would or would not have changed their outcomes. Key though to understanding this inquiry is that it is less a strict test designed to produce specific outcome in particular cases than a framework for raising and balancing key principles that should apply to separation of powers cases. More than driving particular outcomes, the goal is to guarantee the consideration of key values. And these politics-reinforcing justiciability principles should have value, reifying our commitments to robust political debate, separation of powers, and individual rights, even if not embedded in a per se pluralistic political question *doctrine*.

239. See, e.g., *id.* (suggesting courts have comparative institutional advantages in dealing with individual rights claims); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 679 (2013) (describing “focus not on the substantive political outcomes, but on ensuring that the processes are free from incumbent interference” as “a role for which courts are institutionally well suited”); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 95 (2004) (suggesting that courts’ comparative institutional advantages “favor process-oriented doctrines over substantive ones”).

A. Youngstown

As mentioned above, a politics-reinforcing political question doctrine may initially seem to conflict with the framework established in Justice Jackson's *Youngstown* concurrence. Jackson describes three categories of separation-of-powers cases—one in which Congress and the President are aligned, a second in which the President acts in the face of congressional silence, and a third in which they are opposition.²⁴⁰ It is the third category of cases, suggests Justice Jackson, which “must be scrutinized with caution.”²⁴¹ This captures a general intuition, apparent in some commentary on the political question doctrine, that we are less worried about those cases in which the President is acting with Congress than those in which he is acting in opposition to it. It is the latter set of cases that raise the specter of lawlessness or even tyranny. But this intuition seems to point in the opposite direction from the politics-reinforcing political question doctrine, which counsels restraint when the branches are opposed and intervention when they are aligned. A politics-reinforcing political question doctrine must be able to relieve this tension.

In *Youngstown*, the Court was faced with President Truman's decision, in the face of threatened steelworker strikes, to seize the nation's steel plants to guarantee continued steel production during the Korean War.²⁴² In the absence of congressional authorization—in fact, Congress seemed to specifically reject such a power in the legislation it adopted²⁴³—the President relied heavily on his inherent powers as Executive and Commander-in-Chief.²⁴⁴ The majority rejected those arguments and found against the President.²⁴⁵

In his influential concurrence, Justice Jackson suggested that “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”²⁴⁶ “Courts can sustain exclusive Presidential control in such a case” only where the President's powers are “conclusive and preclusive,” essentially “disabling the Congress from acting upon the subject.”²⁴⁷ This has generally been understood as a directive for courts to more heavily scrutinize cases where Congress and the President have taken opposing actions. It also seems to set up a binary choice: if

240. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952).

241. *Id.* at 638.

242. *Id.* at 582–83.

243. *Id.* at 586.

244. *Id.* at 646.

245. *Id.* at 589.

246. *Id.* at 637.

247. *Id.* at 637–38.

Congress has exclusive authority or Congress and the President have concurrent authority, the President must bow to Congressional will; if the President's powers though are exclusive, no Congressional act may stand in her way. In fact, Jackson's concurrence seems to draw an even stronger contrast, suggesting that where the President's powers are exclusive, Congress is "disabled" from acting, whether or not the President has acted contrary to Congress' act. *Zivotofsky II* seems to suggest as much in its focus on the President's exclusive power over recognition.²⁴⁸

Two things are worth noting here. First, Justice Jackson's tripartite framework provides a rubric for assessing the constitutionality of congressional and Presidential acts. It does not suggest that that rubric will be or must always be applied by courts. A politics-reinforcing political question doctrine would leave many separation-of-powers disputes to the public to resolve through politics; Justice Jackson's framework provides a useful rule of thumb for the public to use in assessing the two branches' conflicting claims either before or in the absence of judicial resolution. It also helps frame questions of legality for lawyers within those branches, who need to consider the constitutionality of actions those branches might take. More broadly though, not all conflicts between the branches will be justiciable. Oftentimes, no one will have standing to bring a claim. Mootness and ripeness may also stand in the way of court involvement.²⁴⁹ A politics-reinforcing political question doctrine simply supplies one more argument for non-justiciability or abstention.

Second, there has been some slippage in the case-law in the use of the terms concurrent, independent, exclusive, preclusive, and conclusive. Generally speaking, the President and Congress' powers are exclusive. The President has the exclusive power to receive ambassadors or to negotiate treaties. Congress has the exclusive power to make laws regarding foreign commerce, and the Senate has exclusive power to approve treaties and appointments of ambassadors. The President has exclusive power as Commander-in-Chief; Congress has the exclusive power to declare war and

248. *Zivotofsky II* could be read more narrowly to only disable congressional acts that force the President to "contradict" himself on questions of recognition. While that limiting reading may very well have been the intent of the majority, that limiting reading seems in function mere semantics. A President could always argue that the Government's position is to take no position at all or to remain ambiguous on recognition. Essentially, Congress's acts are only effective when the President chooses to treat them as such.

249. See *Raines v. Byrd*, 521 U.S. 811, 813–14 (1997) (refusing to adjudicate a challenge of the Line Item Veto Act by members of Congress for lack of Article III standing); *Goldwater v. Carter*, 444 U.S. 996, 996–98 (1979) (refusing to decide a dispute between Congress and the Executive on whether the President could terminate a treaty with Taiwan).

to make rules and regulations for the military. These exclusive powers though may result in concurrent authority over a particular question; both branches may have some claim to use their exclusive powers, for example, to dictate the contents of U.S. citizen passports or to make decisions about permissible military tactics.²⁵⁰ The question raised by *Youngstown* category three is what to do when the two branches, exercising their supposedly exclusive powers generate conflicting demands. As the conflicts-of-law language suggests, this situation requires a conflicts rule. The question is whether either branch's authority over an issue is preclusive and/or conclusive, disabling the other branch from exercising its powers in the area.

A politics-reinforcing political question doctrine would not suggest a different conflicts rule. It would simply suggest exercising caution before applying it. Where a plaintiff has standing (see the first point above) and the case cannot be resolved without resolving the conflict between the powers of the branches (in other words, no more minimalist path to decision can be found), the courts would need to apply it.

But before getting to that conflicts rule, the courts must first decide a threshold question: does each branch have "independent" power with regard to that question as all? (Admittedly, these two questions are elided in Justice Jackson's opinion.) Essentially, this is step one of the politics-reinforcing political question doctrine inquiry. If one branch's power is dependent on the acts of the other, it is not "exclusive," and if a branch has no power to act in the absence of authorization from the other, there's no conflict to resolve. The question instead becomes one about the scope of the branch's exclusive powers. If the commander-in-chief power does not grant the President authority to seize steel mills in the United States when no war is taking place there, the courts should have no problem deciding the case against the President. So too, if the Commander-in-Chief does not include the power to set up military commissions outside of wartime.²⁵¹ A politics-reinforcing political question doctrine would not suggest otherwise. It would only counsel caution when the branches have concurrent, exclusive authority over an issue. In other words, *Youngstown* would likely turn out the same way, a

250. Cf. *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2126 (Scalia, J., dissenting) ("For this reason, they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other's policies.").

251. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 597–613 (2006) (plurality opinion) (observing that "[n]one of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war").

defeat for the President, even with a politics-reinforcing political question doctrine.²⁵²

To put it a different way, applying a politics-reinforcing political question doctrine to a particular case would require a court to first do a prima facie analysis of whether each branch seemed to have exclusive or independent powers that authorized it to act in the way it sought to. In the case of President Truman's seizure of the steel mills to avert a strike during the Korean War, the issue raised in *Youngstown*, the question would be whether any of the President's constitutional powers gave him the authority to do so on his own, without congressional authorization. If the answer is clearly no, the courts should simply decide the case that way. The same would apply to Congress.²⁵³ If, as some suggested, Congress simply lacked any independent constitutional authority to dictate what country is listed as a place of birth in a passport, the courts should simply have decided *Zivotofsky II* against it.²⁵⁴ With regard to either branch, the answer may depend on the court's theory of their respective powers—in other words, different courts may come to different conclusions.²⁵⁵ If though, there is an at least arguable case that the two branches each have independent, exclusive power to act on the issue, the politics-reinforcing political question doctrine would kick in. *Youngstown* though helps demonstrate how many of the most worrisome acts of overreach by one of the political branches will be effectively blocked in step one, before a politics-reinforcing political question doctrine is even applied.

None of this is meant to suggest that doing such a prima facie inquiry would be simple or that there is a clear line between “off-the-wall” and plausible, arguable, or colorable claims of independent constitutional authority.²⁵⁶ Even if we were to suggest a strict test of what might be on one

252. Cf. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1782–85 (2012) (suggesting that *Youngstown* should have been an easy case against the President because any “prerogative” powers he might have would not allow the President to take property in the absence of legal authorization). Chapman and McConnell also suggest that *Youngstown* would survive the politics-reinforcing political question doctrine under step two as a clear case of an individual rights violation—a deprivation of property without due process of law. *Id.*

253. Of course, given the breadth of Congress's powers under current doctrine, including powers granted by the Necessary and Proper Clause, cases involving attempted congressional acts that are obviously beyond their powers may be rare.

254. See *infra* note 239.

255. Of course, deciding whether something is within a branch's exclusive powers may be complicated—more art than science. A politics-reinforcing political question doctrine would have no force if the courts were always forced to first definitively decide what was inside or outside the scope of the branch's authority. The doctrine might collapse in upon itself.

256. See Pozen, *supra* note 5, at 916.

side of the line, courts would likely differ in their judgment and differ over time.²⁵⁷ Constitutional plausibility has a way of shifting with ideology, political realities, and cultural norms.²⁵⁸ This inquiry though is not meant to produce specific outcomes. Instead, it is designed to highlight the questions the court should ask in its attempt to balance the constitutional interests laid out here, including both rule-of-law and room for political debate. The more implausible a branch's claim of independent constitutional power seems, the more a court should consider simply deciding against it; the more plausible it seems, the more a court should consider abstention or at least minimalism.

B. Zivotofsky

As described above, *Zivotofsky I* and *II* involved the President's decision to continue listing "Jerusalem" as the place of birth on all passports of American citizens born despite a statute requiring "Israel" to be recorded instead when the citizen (or his or her guardian) so requested.²⁵⁹ In *Zivotofsky I*, a majority of the Court held that the case did not present a political question.²⁶⁰ In *Zivotofsky II*, a majority of the Court held in favor of the President, finding that the statute unconstitutionally impinged upon the President's exclusive power over the recognition of states and governments.²⁶¹

As in *Youngtown*, there is little doubt that *Zivotofsky* passes one of the two step-one thresholds for applying the politics-reinforcing political question doctrine. The President and Congress are clearly opposed. Even more so, they were using their disagreement over their respective powers as a way to debate a substantive policy question of interest to the American public—the United States' position on the status of Jerusalem. The other part of step-one analysis might be less clear. Justice Thomas argued that requiring the notation of a particular place of birth in a passport was completely beyond Congress's enumerated powers.²⁶² Justice Scalia, in dissent, argued that the notation of Jerusalem or Israel did not invoke the President's power to receive ambassadors.²⁶³ Perhaps either or both would think that those answers are

257. We could always try to devise strict standards of plausibility. It seems unlikely though that they would matter or change the results.

258. See JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 119 (2011); Pozen, *supra* note 5, at 916.

259. See *supra* Part II.B.

260. *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1424 (2012).

261. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2081 (2015).

262. *Id.* at 2097 (Thomas, J., concurring).

263. *Id.* at 2119 (Scalia, J., dissenting).

obvious enough to avoid the politics-reinforcing political question doctrine entirely. The question in the case was not posed to them that way though. Having decided in *Zivotofsky I* that the case was justiciable, both justices had to decide the case for one or the other branch. Had they been asked whether Congress and the President could make out at least prima facie cases that they had authority over passport notations, the two Justices might have thought they did. Even if they would not, most other observers likely would have. The uncertain boundaries between the President's and Congress's powers over recognition and passports are what made the case so difficult.

Assuming then that the step-one inquiries would suggest a case ripe for the politics-reinforcing political question doctrine, the inquiry turns to step two, which weighs the importance of the plaintiff's claim. Protecting the functions of the political process is an important interest, but so too is vindicating important individual rights.²⁶⁴ In the case of *Zivotofsky*, the lower courts considered whether Menachem Zivotofsky had a sufficient interest in the passport notation he requested to give him standing to challenge the Executive Branch's policy.²⁶⁵ Zivotofsky's injury might have seemed frivolous or hypothetical, but the D.C. Circuit Court of Appeal determined that the denial of an individualized, statutory right—here, the right to choose “Israel” over “Jerusalem”—was an injury-in-fact sufficient to give him standing to sue.²⁶⁶ But regardless of whether Zivotofsky had standing, his injury might still be too small to offset concerns about resolving separation-of-powers questions unnecessarily. A court could reasonably find that Zivotofsky might have standing, but that the politics-reinforcing political question doctrine would still counsel abstention.

It is important to keep this step-one analysis distinct from standing. There have been some who have argued that individuals should not have standing to bring what are really separation-of-powers claims.²⁶⁷ But bringing all of the concerns that might make a case a political question into the standing analysis warps that analysis, which should, fundamentally, be about the plaintiff and not about the structure or health of American democracy. Moreover, standing is too blunt a tool to accomplish the goals of the politics-reinforcing political question doctrine. Either plaintiffs have standing to raise

264. See Nzelibe, *supra* note 99, at 1005 (advocating for a balancing model where “the courts would not abstain from any controversy that presents a ‘bona fide’ individual rights claim even if it purports to challenge the ‘wisdom’ of a foreign policy determination”).

265. *Zivotofsky ex rel. Ari Z. v. Sec’y of State*, 444 F.3d 614, 615, 617 (D.C. Cir. 2006).

266. *Id.* at 617.

267. See, e.g., Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1475–80 (2013). But see Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 670 (2016) (arguing that Huq is wrong).

separation of powers claims, or plaintiffs do not. Standing doctrine does not distinguish between cases where the political branches are in agreement or disagreement, a distinction this Article suggests is of central importance. Because standing turns on the plaintiff and the plaintiff's claim rather than on the nature of the political act, there is no principled way to use standing doctrine to protect open channels of democratic debate while scrutinizing potential cases of democratic failure or political branch collusion. If anything, standing may be easier to find in cases involving congressional-Presidential disagreement since plaintiffs will be able to show injury where, as in *Zivotofsky*, Congress has granted a right and the President has denied it.

If a court though thought Menachem Zivotofsky's claim important enough to require judicial intervention, the politics-reinforcing political question doctrine would still play a role, suggesting to that court that it decide Zivotofsky's claim in the manner that resolves as few separation-of-powers question as possible. Justice Scalia's dissent in *Zivotofsky II* might reflect that sort of minimalism. Justice Scalia focused on the specific requirement enacted by Congress. For him, requiring the notation of Israel in a passport is not, in-and-of-itself, an act of recognition. It is too insignificant an act, with too uncertain of a meaning, to act as U.S. policy on the status of Jerusalem. On this basis, Justice Scalia would have held for the Zivotofskys on narrow grounds—narrow grounds that would say little about the actual boundaries between presidential and congressional authority over recognition of states or governments in future cases.²⁶⁸ Justice Scalia emphasizes the questions he is not deciding: “the Constitution may well deny Congress power to recognize,”²⁶⁹ and “[e]ven if the Constitution gives the President sole power,”²⁷⁰ he hedges.

Endorsing such minimalism raises two objections: one, that minimalism could, over-time, incrementally have the same effect as the maximalism this

268. Another example of this sort of minimalism might be detected in the Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556–57 (2014), another case in which the plaintiff's case necessitated a decision on the boundaries of the political branches' respective authority. For some, the Court's split-the-baby approach, in which it decided that the President could make recess appointments between sessions of Congress, but that only “significant interruptions of legislative business” longer than ten days would count, seemed pulled from thin-air. But it could be read as an implicit recognition of the principles described in this Article and an attempt to retain as much space for political branch jockeying as possible. Cf. Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 127 (2014) (describing the value of the holding's specificity). The back-and-forth over appointments is, of course, one of the ways that uncertain, overlapping powers of the political branches give voice to different parts of the electorate.

269. *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2121 (2015) (Scalia, J., dissenting).

270. *Id.* at 2120.

doctrine is trying to avoid, and the other, that minimalist views may not be neutral, but may systematically favor one branch over the other. With regard to the first, it is possible that small moves to define the boundaries of the political branches' respective powers could over time add up, eventually leading to the overly constricted, overly siloed understanding of their powers that a politics-reinforcing political question doctrine is designed to avoid. The cases that require these kinds of decisions though should be quite rare, and the accretion of decisions necessary to have that effect might be measured in the centuries rather than decades. The second objection is based on a hypothesis that may or may not be correct. But even if it is, it highlights the fact that the politics-reinforcing political question doctrine should dictate the scope of outcomes, not the outcomes themselves. On occasion, it may not be possible to hold for either Congress or the President in a minimalist way. This might have been true in *Zivotofsky II*. The majority tried to limit its opinion to cases in which Congress is asking the President to contradict himself on a question of recognition²⁷¹ and disavowed the broad executive dicta of *Curtiss-Wright*.²⁷² In the end though, to get to a conclusion that the President must control even small acts regarding recognition, the majority may have had no choice but to recognize a broad, disabling power in the President.²⁷³ A narrower route to finding for the President may not have been possible. For judges believing that the President should have that authority over passports, a more maximalist opinion might have been the only option, and the politics-reinforcing political question cannot stand in its way.

One last note on *Zivotofsky*: *Zivotofsky* demonstrates well why abstaining under the politics-reinforcing political question doctrine need not be a blank check for the President. Critics would rightly observe that if the courts refrain from intervening in disputes between the President and Congress, the President may, in many cases, simply be able to do as he wishes.²⁷⁴ But *Zivotofsky* highlights the political salience of these disputes. If the courts had refused to intervene in *Zivotofsky*'s case, the *Zivotofskys* would still have been able to make arguments to the public about the President's refusal to

271. *Id.* at 2080 (“If Congress may not pass a law, speaking in its own voice, effecting formal recognition, then it may not force the President . . . to contradict his prior recognition determination.”).

272. *Id.* at 2079 (explaining that the Court's precedent recognizes recognition as an exclusive executive power, but that *Curtiss-Wright* “does not support a broader definition of the Executive's power over foreign relations that would permit the President alone to determine the whole content of the Nation's foreign policy”).

273. See Cohen, *supra* note 178, at 12.

274. See Galbraith, *supra* note, 27, at 17 (“Treatment of the case as a political question would not do a lot to preserve uncertainty, since that outcome would effectively have handed a long-term institutional victory to the executive branch by removing the threat of judicial review.”).

abide by Congress, and Congress's active opposition to the President suggests that those arguments may have been politically salient. Congress too could have pushed back, holding hearings, enacting other similar laws, even threatening impeachment. None of those may have changed the President's stance entirely, but they certainly would have served their role in articulating a different view within the public on the status of Jerusalem, one that the President might want to take into account. It might not get a notation of "Israel" in Menachem Zivotofsky's passport. But of course, after the courts' intervention in *Zivotofsky II*, that certainly won't happen, and now, the room for those political debates is partially closed off.

C. Boumediene

Boumediene v. Bush demonstrates the ways in which the two-step inquiry guarantees that the courts will intervene to decide hard, political salient cases when necessary. It helps explain why *Boumediene v. Bush* was not, and should not have been treated as a political question. As such, it also helps explain why the politics-reinforcing political question doctrine should not be subject to the same criticisms that have long dogged the modern post-*Baker* version of the doctrine.

Boumediene involved a challenge by non-citizen detainees to their detention at Guantanamo Bay and the constitutionality of the Military Commissions Act, which limited any review of their detention to the procedures established in the Detainee Treatment Act.²⁷⁵ *Baker*'s factors might have suggested that such a case could be a political question. For one thing, the case raised the question of whether the constitutional right to habeas corpus applied to Guantanamo Bay at all, a question that might turn in part on whether Guantanamo Bay was under the sovereignty of the United States.²⁷⁶ The position of the United States had long been that the United States was merely leasing Guantanamo Bay and that Cuba retained sovereignty.²⁷⁷ In the past, questions of sovereignty had been treated as political questions left to the political branches, something Justice Kennedy

275. The Military Commissions Act of 2006 amended the federal habeas statute to strip from federal courts any and all "jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

276. *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

277. *Id.* at 727.

discussed in his majority opinion.²⁷⁸ Undiscussed in the case though were the fact that the case involved questions of national security that courts had often found to be committed to the political branches under the first *Baker* factor, that the case involved difficult questions about how much process to give detainees in an ongoing conflict that might confound manageable judicial standards under the second factor, and that resolving the case threatened judicial policymaking, embarrassment for the political branches, finality, and the United States' ability to speak with one voice in foreign affairs under factors three through six. The fact that none of these were even raised in the case reflects the implicit understanding that certain, important individual rights claims presented an exception to the political question.²⁷⁹

A politics-reinforcing political question doctrine does a far better job than *Baker* at explaining why the case did not present political questions that the courts should abstain from answering. First, the threshold set in step one of the politics-reinforcing political question doctrine analysis could not be overcome. The two branches were not in disagreement, nor did the case turn on the scope of their respective, as opposed to joint powers. Moreover, abstaining would not have reinforced the space for political debate. On the contrary, the political debate had run its course. In *Hamdan v. Rumsfeld*, four of the justices had invited Congress to express its views more clearly.²⁸⁰ The Military Commissions Act was Congress's response. And given the climate of the war on terror, the unpopularity of the detainees at Guantanamo, and concerns that Congress might defer too much to the Executive in wartime, the courts would have had more than sufficient reason to worry that political process was not functioning properly or was silencing rather than empowering particular voices. Intervention to inquire about those processes would have seemed the prudent, democracy-reinforcing path.

Even if step one had suggested applying the politics-reinforcing political question doctrine, step two would have weighed in favor of deciding the case. The right to challenge one's detention is among the most fundamental of rights, and the politics-reinforcing political question doctrine would not have blocked consideration of the detainees' claims. And the case arguably warranted Justice Kennedy's more maximalist opinion that the constitution

278. *Id.* at 753; see also Anthony J. Colangelo, "De Facto Sovereignty": Boumediene and Beyond, 77 GEO. WASH. L. REV. 623, 674 (2009).

279. See Nzelibe, *supra* note 99, at 1000; see also Chapman & McConnell, *supra* note 252, at 1783–85 (reframing *Youngstown* as an individual rights case concerning deprivation of property without due process of law).

280. *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) ("Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger.").

extends the writ of habeas corpus to a place, like Guantanamo Bay, where the United States exercises de facto control. A more minimalist opinion might have read the processes of the Detainee Treatment Act expansively so that it could provide an adequate substitute for habeas review and eliminate the need to decide the broader question whether habeas corpus extended to Guantanamo Bay. But such a minimalist opinion would have done nothing to preserve space for democratic deliberation. On the contrary, the argument that Guantanamo Bay was beyond the Constitution's reach had been used to shut down debate.

V. CONCLUSION

Since *Baker*, the political question doctrine has become a shield behind which the political branches hide from scrutiny. Rather than protecting the political process, the doctrine now protects political outcomes—a trump card that ends debate. And critics have been right to criticize it as such. *Zivotofsky I* and *Zivotofsky II* though show that simply eliminating the doctrine will not solve the problem. Removing the political question doctrine will not guarantee scrutiny of governmental decisions. In fact, if the courts decide on the merits in favor of broad political branch powers, scrutiny may become even more difficult. What is needed instead is a doctrine specifically designed around encouraging and promoting debate and scrutiny. The politics-reinforcing political question doctrine can serve that role.