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# The Uniqueness of Foreign Affairs

Jide Nzelibe

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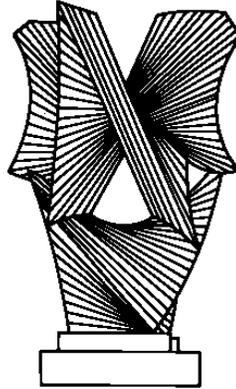
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# CHICAGO

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## THE UNIQUENESS OF FOREIGN AFFAIRS

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# The Uniqueness of Foreign Affairs

(forthcoming in Iowa Law Review (2004)).

Jide Nzelibe\*

## Abstract

*This Article attempts to explain and justify the exceptional treatment that courts accord foreign affairs issues under the political question doctrine. For the most part, academic commentators have attacked the political question doctrine, arguing that the doctrine is both incoherent and inconsistent with the Marbury tradition of judicial review. Challenging the conventional academic wisdom, this Article contends that institutional competence considerations continue to warrant broad application of the doctrine in the foreign affairs context. More specifically, this Article argues that the power-based nature of most international policy decisions continues to constrain the power of the courts to adjudicate on foreign affairs controversies. Nonetheless, the mere involvement of foreign affairs in a legal dispute should not automatically preclude judicial review. Rather, this Article suggests an alternative vision of the judicial function in foreign affairs, which I call the balance of institutional competencies approach. This approach envisions a spectrum of judicial authority in foreign affairs, which depends on whether the underlying foreign affairs controversy implicates individual rights or domestic property interests, or whether Congress has legislated on the particular foreign affairs issue in question. When viewed as a device for the proper allocation of institutional competencies in foreign affairs disputes, this Article contends that the political question doctrine is both doctrinally coherent and, in the proper circumstances, normatively attractive.*

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## INTRODUCTION

The judicial treatment of foreign affairs is in a muddle. Since the early nineteenth century, the courts have developed special doctrines of abstention and deference to ensure minimal judicial intervention in foreign affairs disputes. Today, these doctrines are under siege. Some commentators have even pronounced the heartland of judicial abstention – the doctrine of political questions – a dead letter.<sup>1</sup> While the reports of the doctrine's demise in foreign affairs are greatly exaggerated,<sup>2</sup> its judicial application is replete with so many inconsistencies that its basic contours remain ill-defined and incoherent.<sup>3</sup>

In law, doctrinal confusion breeds doctrinal contempt. Most recently, in the wake of the President's efforts to combat international terrorism, debates about the scope of the judicial function in foreign affairs and national security have once again come to the fore.<sup>4</sup> Increasingly, a growing number of voices in the academy, including those of the most prominent foreign affairs scholars, have argued that there is no longer any justification for the special treatment courts accord foreign affairs controversies.<sup>5</sup> Some of these

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<sup>1</sup> See e.g., William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2308 (2002) (observing that “the decline of the political question doctrine. . . has been pervasive in all kinds of cases”); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, (2002) (chronicling the demise of the political question doctrine and suggesting that Court's refusal to invoke the doctrine in the 2000 presidential election cases marked the nadir of the doctrine as a constraint on judicial review).

<sup>2</sup> See PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 444 (4th ed. 1998) (“Though successful resort to the political question doctrine in purely domestic disputes is rare, the doctrine appears to have greater vitality in foreign affairs.”).

<sup>3</sup> In a recent decision in the First Circuit, for instance, the court referred to the political question's incoherence as grounds for declining to apply it to a claim challenging the constitutionality of the President's decision to initiate war with Iraq. See *Doe v. Bush*, No. 03-1266, 2003 WL 1093975, at \*6 (1<sup>st</sup> Cir. March 12, 2003) (observing that “the political question doctrine—that courts should not intervene in questions that are the province of the legislative and executive branches—is a famously murky one.”). The court ultimately decided not to review the claim on ripeness grounds. *Id.* at \* 7 -\*8. See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring) (“That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court”); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.6, at 144 (3d ed.1999) (“In many ways, the political question doctrine is the most confusing of the justiciability doctrines.”).

<sup>4</sup> See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 23-24 (2003) (criticizing the government's position that the courts cannot review the President's decision to detain foreign nationals and U.S. citizens who are terrorist suspects indefinitely, without a hearing, and without access to counsel); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1309-10 (2002) (arguing that the federal courts should have a role in reviewing the decisions of the military tribunals recently established as part of the war against terrorism).

<sup>5</sup> Peter J. Spiro, *Globalization and the (Foreign Affairs Constitution)*, 63 OHIO ST. L.J. 649, 675-80 (2002) (arguing that globalization has made political question doctrine in foreign affairs irrelevant); THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 4-5 (1992) (arguing that the prudential and constitutional considerations underpinning the political question doctrine in foreign affairs are wrong

commentators have even proposed that the courts scrap the application of the political question doctrine in foreign affairs altogether,<sup>6</sup> while others have argued that the scope of the doctrine should be severely restricted.<sup>7</sup> These critics, particularly academics, concentrate their attacks on those instances where the courts apply the political question doctrine to avoid addressing constitutional questions about the allocation of foreign affairs powers.<sup>8</sup>

These critics are wrong. Foreign affairs is different. And while the courts' current explanations for the practice of judicial abstention or deference in foreign affairs are indeed inadequate, the judicial conclusion that the doctrine remains viable in foreign affairs is correct. In this Article, I suggest an alternative vision of the judicial function in foreign affairs – the balance of institutional competencies model – that provides a definition of the proper contours of judicial abstention and deference in constitutional foreign affairs controversies.

In contrast to other explanations that may rely purely on textual, structural, or other prudential factors, this model explains why the courts should continue to apply the political question doctrine to foreign affairs issues even as the doctrine declines in the domestic arena. Drawing on insights from international relations and the early constitutional history of the foreign affairs powers, the model demonstrates that compared to the political branches, the courts suffer from peculiar institutional disadvantages that often warrant absolute deference to the decision of the political branches in most foreign affairs controversies. *First*, and most significantly, compared to the political branches, the courts lack the institutional resources or capacity to track the evolution of international norms that govern the meaning of the terms underlying the foreign affairs powers. *Second*, the general presumption of institutional legitimacy the courts enjoy when they adjudicate on domestic constitutional questions does not extend to foreign affairs controversies. *Third*, unlike in the domestic context, the costs of judicial intervention in the foreign affairs context seriously outweigh any of its purported benefits.

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and the doctrine should be abolished); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 815 (1989) ("In modern American society, these justifications for judicial abstention [under the political question doctrine] seem increasingly to be calls for judicial abdication").

<sup>6</sup>See, e.g., FRANCK, *supra* note \_\_ at 4-5; HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 221-24 (1990); Glennon, *supra* note \_\_ at 815-16; Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 529-31 (1987); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1033 (1985); Sinard, *supra* note \_\_ at 306.

<sup>7</sup>See, e.g., Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 219 (1985) ("The doctrine should have essentially no application outside of foreign relations and, although theoretically applicable to some foreign affairs controversies, its practical utility even in that area should be negligible.")

<sup>8</sup>See, e.g., FRANCK, *supra* note \_\_, at 36-38 (arguing that the courts should be the umpires in all allocation of foreign affairs powers disputes); Michael E. Tigar, *Judicial Power, The 'Political Question Doctrine,' and Foreign Relations*, 17 UCLA LAW REV. 1135 (1970) (arguing that courts have a constitutional duty to decide the allocation of war-powers authority).

In addition, this model provides a framework for discerning those constitutional foreign affairs controversies that deserve judicial abstention, as opposed to those that deserve judicial deference. In the main, the model treats the doctrines of abstention and deference as inextricably related and as involving differences in degree, rather than differences in kind. Framed in this manner, the balance of institutional competencies envisions a spectrum of judicial authority in foreign affairs, which depends on whether the underlying foreign affairs controversy implicates individual rights or domestic property interests, or whether Congress has legislated on the particular foreign affairs issue in question. By adopting this framework, this model explicitly rejects an analysis that attempts to draw bright-line boundaries between judicial abstention and deference in foreign affairs.

This Article proceeds in three parts. Part I provides a critical examination of the current state of the political question doctrine in foreign affairs. Part II demonstrates that the critics of the political question doctrine in foreign affairs have not provided a coherent reason for abandoning or significantly curtailing the doctrine in foreign affairs. Part III outlines an alternative model of judicial abstention or deference in foreign affairs that relies on a balance of institutional competencies model. This Part first points out the comparative disadvantages that the judicial branch faces when it tries to resolve constitutional foreign affairs controversies. This Part then suggests a different lens for understanding the judicial function in foreign affairs controversies, which helps to define the scope of judicial abstention and deference in such controversies. Two important examples demonstrate the efficacy of this approach: individual rights claims that challenge foreign policy decisions; and the judicial construction of statutes where Congress has legislated in a foreign affairs area that the courts normally abstain from under the political question doctrine.

One caveat: This Article does not purport to explain the judicial function in all spheres of foreign affairs law. For the most part, the focus of this Article is on the constitutional law of foreign affairs, and it does not discuss other realms of foreign affairs law, such as the act of state doctrine, customary international law, and federal common law. Moreover, the Article only discusses statutory or treaty based foreign affairs issues to the extent they relate to constitutional separation of powers controversies.

## I. FOREIGN AFFAIRS AND THE EVOLUTION OF THE POLITICAL QUESTION DOCTRINE

This Part examines the evolution judicial doctrines of abstention and deference in foreign affairs. Section A begins by briefly examining the judicial approach to foreign affairs controversies in the early Republic. Section B reviews the current status of judicial abstention in foreign affairs. Section C suggests that the court's current jurisprudence of political questions is gradually veering towards an institutional competence approach. Finally, the last section lays out a critique of the current explanations the courts offer for abstention on foreign affairs matters under the political question doctrine.

### A. *Foreign Affairs Abstention and Deference in the Early Republic*

One of the most familiar principles of American constitutional theory is that it is the province of the courts, in Justice Marshall's parlance, "to say what the law is."<sup>9</sup> Nonetheless, ever since Marshall's declaration, the Supreme Court has consistently gone out of its way to stress that under the political question doctrine, certain constitutional controversies are not amenable to judicial review.<sup>10</sup> Indeed, the very decision that established judicial review also suggested that there were also certain exceptions to the scope of such review. According to Marshall, these involved certain legal issues, which were "in their nature political, or which are, by the constitution and laws, submitted to the executive."<sup>11</sup> But while *Marbury* is frequently invoked for the proposition that it is the province of the courts to interpret the law, this other part of the *Marbury* legacy is frequently ignored.<sup>12</sup>

Marshall pointed specifically to foreign affairs as one of the areas in which courts should abstain from questioning the judgment of the executive branch. He observed that the foreign affairs acts of an executive "officer . . . can never be examinable by the courts."<sup>13</sup> The notion that Marshall expresses here – that foreign affairs is uniquely an executive function that warrants special deference from the courts – antedates the establishment of the Constitution. As early as 1765, William Blackstone affirmed the supremacy of executive power in foreign affairs when he declared that "[w]hat is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men."<sup>14</sup> The early English cases also established a clear distinction between judicial and political authority in the context of foreign affairs.<sup>15</sup> The first reference to such a possible distinction by the Supreme Court of the United States was in *Ware v. Hylton*,<sup>16</sup> where Justice Iredell held

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<sup>9</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803)

<sup>10</sup> See, e.g., *Nixon v. United States*, (holding that whether the Senate could impeach federal judge without giving him a full evidentiary hearing before the entire United States Senate constituted a political question); *Coleman v. Miller*, 307 U.S. 433, 452-454 (1939) (holding that the lifespan of proposed constitutional amendment presented a non-justiciable political question).

<sup>11</sup> *Marbury*, 5 U.S. at 165-66.

<sup>12</sup> See Susan Herman, *Splitting the Atom of Marshall's Wisdom*, 16 ST JOHN'S J. LEGAL COMMENT 371, 374-75 (2002) (contending that the current Supreme Court has forgotten the part of Marshall's legacy that emphasized Congress's role in deciding the meaning of the Constitution).

<sup>13</sup> *Marbury*, 5 U.S. at 166.

<sup>14</sup> W. BLACKSTONE, 1 COMMENTARIES 252 (W. Morrison ed., Cavendish Publishing 2001).

<sup>15</sup> See, e.g., *Nabob of the Carnatic v. The East India Company*, 2 Ves. Jr. 56 (1793) (the court decided that matters regarding political treaties between a foreign state and the subjects of Great Britain could not be examined by the judiciary); *Penn v. Lord Baltimore*, 1 Ves. 444 (1750) (holding that conflicting boundary claims between Lord Baltimore and Penn were not justiciable). Both of these English cases were cited approvingly by subsequent U.S. Supreme Court decisions in support of the proposition that there is a political question doctrine. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 56 (1849); *State of Ga. v. Stanton*, 73 U.S. 50, 71 n.20 (1867).

<sup>16</sup> 3 U.S. (Dall.) 199 (1796).

that the issue of whether there was a breach of a treaty between England and United States involved “considerations of policy ... certainly entirely incompetent to the examination and decision of a Court of Justice.”<sup>17</sup>

Despite these broad proclamations, however, the early Court decisions regarding the scope of the political question doctrine were largely inconclusive.<sup>18</sup> The Court did not attempt to set forth a coherent framework for segregating political from legal questions until the modern era.

#### B. *The Status of the Doctrine in the Modern Era*

The Supreme Court’s most comprehensive effort to rationalize the political question doctrine was *Baker v. Carr*, in which the Court held that the doctrine did not apply to an equal protection challenge to the apportionment of legislative districts.<sup>19</sup> Justice Brennan, who wrote the majority opinion in the case, surveyed the much of preceding case law on political questions and came up with a laundry list of factors that courts should consider in deciding whether to abstain under the doctrine. His often-quoted opinion described those factors in substantial detail:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>20</sup>

Since *Baker*, the Supreme Court has invoked the doctrine twice in foreign affairs controversies. In one case, the Court applied the doctrine to a constitutional challenge to the training regimen of a National Guard unit,<sup>21</sup> while a plurality of the Court invoked

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<sup>17</sup> *Id.* at 260

<sup>18</sup> The first clear instance of the application of the doctrine by the Supreme Court was in *Luther v. Borden*, which involved a challenge to the legality of the charter government of Rhode Island at the time of the Dorr rebellion. 28 U.S. (7 How.) 1 (1849). The Court treated this issue as a non-justiciable political question because it held only Congress could enforce the provision of the Constitution that gave states the right to a republican form of government. *Id.* at 47. In reaching this decision, the Court also considered the practical difficulties that would result if it were to decide that the charter government of Rhode Island was illegal. *Id.* at 39-41. The Court provided little guidance, however, as to the kind of factors a court should consider in deciding whether to invoke the doctrine.

<sup>19</sup> 362 U.S. 186 (1962).

<sup>20</sup> *Baker*, 369 U.S. at 217.

<sup>21</sup> *Gilligan v. Morgan*, 413 U.S. 1 (1973).

the doctrine in another case challenging the President's authority to terminate a treaty without Senate ratification.<sup>22</sup> The political question doctrine is more active in the lower courts where it has been recently applied to a wider range of foreign affairs disputes, such as controversies over the allocation of foreign affairs powers,<sup>23</sup> the issue of the liability of successor states when a foreign state disintegrates,<sup>24</sup> the question of whether a party can recover for claims of forced labor in German camps,<sup>25</sup> and the enforcement of a house resolution approving of a Jewish homeland in Palestine.<sup>26</sup>

In invoking the doctrine in foreign affairs and other kinds of controversies, the courts have sometimes relied on classical considerations, which assume that the Constitution itself requires judicial abstention on the relevant constitutional controversy.<sup>27</sup> Professor Weschler, to whom we owe much of our modern understanding of the classical version of the doctrine, made it clear that the scope of the doctrine was narrow: "the only proper judgment that may lead to abstention from decision is that the Constitution has committed the determination to another agency of government than the courts."<sup>28</sup> *Baker's* first factor, whether the issue involves "a textually demonstrable constitutional commitment of an issue to a coordinate political department" mirrors Weschler's notion of a constitutionally based doctrine of the political question.<sup>29</sup>

In response to Weschler's classical model, Alexander Bickel argued that the doctrine was not constitutionally mandated, but "something greatly more flexible, something of prudence, not construction and not principle."<sup>30</sup> *Baker's* five other factors fit

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<sup>22</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>23</sup> See e.g., *Mahorner v. Bush*, 224 F. Supp. 2d 48 (D.D.C. 2002) (dismissing sua sponte as nonjusticiable under the political question doctrine a claim seeking to enjoin the President from engaging in war against Iraq absent a declaration of war by Congress); *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir.2001) (holding that the issue of "what kinds of agreements require Senate ratification...presents a nonjusticiable political question").

<sup>24</sup> See *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 164 (2d Cir. 2000); *Can v. United States*, 14 F.3d 160 (2d Cir.1994).

<sup>25</sup> See *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 483-84 (D.N.J.1999).

<sup>26</sup> See *Greenberg v. Bush*, 150 F.Supp.2d 447, 452-53 (E.D.N.Y. 2001).

<sup>27</sup> See, e.g., *767 Third Av. Assocs.*, 218 F.3d at 160 ("Because the "nonjusticiability of political questions is primarily a function of the constitutional separation of powers ... the dominant consideration in any political question inquiry is whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department.") (quotations omitted)

<sup>28</sup> Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959).

<sup>29</sup> See Daniel Lovejoy, *The Ambiguous Basis for Chevron Deference: Multiple Agency Statutes*, 88 VA. L. REV. 879, 891 (2002) (arguing that "all of the criteria that the Court described (except the first, involving a "textually demonstrable constitutional commitment of the issue to a coordinate political department") reflect prudential concerns, rather than constitutional ones.")

<sup>30</sup> Alexander M. Bickel, *The Supreme Court, 1960 Term--Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961). Professor Scharpf described a third non-constitutional version of the doctrine, which he claimed was descriptively superior to Bickel's prudential factors. See, Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538-39, 566-83 (1966). In reality, the new

Bickel's prudential strain model, although many of the factors *Baker* are framed in terms of institutional competence, as opposed to Bickel's concerns of expediency.<sup>31</sup>

Bickel regarded the doctrine and the other judicial avoidance techniques as critical in conserving the credibility of the judiciary and promoting principled decision-making. He claimed that by abstaining, "the Court does not necessarily forsake an educational function, nor does it abandon principle."<sup>32</sup> In other words, by withholding constitutional judgment in certain controversial cases, the Court could avoid engaging in unprincipled decision-making by legitimating bad laws enacted by the political branches.<sup>33</sup>

C. *Blending the Two Strains of the Doctrine: A Shift Towards an Institutional Competence Approach?*

For the most part, the received wisdom has treated the constitutional and prudential strains as analytically distinct, each vindicating different goals and possibly in tension with each other.<sup>34</sup> Indeed, Bickel himself strongly resisted the notion that the political question doctrine, as he understood it, could have any constitutional underpinnings: "[O]nly by means of a play on word can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation governed by the general standards of the interpretive process. The political question doctrine simply resists being domesticated in this fashion."<sup>35</sup> From the perspective of the

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factors that Scharpf describes -- difficulties of access to information, the need for uniformity of decisions, and deference to wider responsibilities of the political departments -- are all simply a different variation of the prudential considerations described by Bickel. See Redish, *supra* note \_\_, at 1043 ("[T]he 'functional' approach, as Scharpf describes it, appears to be merely a subset of a 'prudential' doctrine").

<sup>31</sup> Bickel described in broad language the circumstances that would justify invocation of the doctrine:

[T]he Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962).

<sup>32</sup> See BICKEL, *supra* note \_\_, at 70. .

<sup>33</sup> See Redish, *supra* note \_\_, at 1031-32 (stating that Bickel viewed the doctrine as the "best means to assure that the Supreme Court's substantive constitutional decisions will be the outgrowth of logic and reason, rather than of a purely pragmatic result orientation").

<sup>34</sup> See, e.g., Barkow, *supra* note \_\_ at 263 (observing that "the problem with the prudential theory . . . is that once the political question doctrine is unleashed entirely from the Constitution itself, what keeps a judge use of the doctrine in check?"); Redish, *supra* note \_\_ at 1049 ("[T]he concerns for principled decisionmaking as a rationale for the political question doctrine represents an unduly narrow, short-sighted and even solipsistic view of the judiciary's function in a constitutional system"); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"--A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1 (1964) (criticizing Bickel's model as "vulnerable and dangerous"); Herbert Wechsler, Book Review, 75 YALE L.J. 672, 674 (1966) (arguing that Bickel's model would "divorce the Court entirely from the text that it interprets and ... equate completely what is constitutional and what is good.").

<sup>35</sup> BICKEL, *supra* note \_\_ at 125.

proponents of the constitutional strain of the doctrine, the implications of Bickel's prudential version were deeply troubling. As Gerald Gunther, one of Bickel's most outspoken critics noted: "Ultimately, it is Bickel's starting point – his rigorous insistence that constitutional adjudication be truly principled . . . that proved to be his undoing."<sup>36</sup>

Framed in this manner, it would appear that the goals of the two strains of the doctrine are irreconcilable. More importantly, in an era where the courts appear to assume an exclusive role in policing constitutional activity between the political branches,<sup>37</sup> it would seem that Bickel's non-legalistic conception of the judicial function, especially its emphasis on discretionary abstention on constitutional questions, would be problematic, if not heretical. Indeed, perhaps because of this difficulty, much of the scholarly commentary now assumes that the Supreme Court has effectively abandoned the prudential strain of the doctrine.<sup>38</sup>

Far from treating the two strains of the doctrine as distinct, however, the Court often uses prudential considerations, more specifically institutional competence considerations, to inform its textual analysis when deciding whether the Constitution requires abstention on any specific issue.

Consider, for instance, the Court's decision in *Nixon v. United States*, a case involving whether the Senate could impeach a federal judge based on the report of a Senate Committee rather than the Senate meeting as a whole.<sup>39</sup> In that case, the Court explicitly endorsed the blending of the two strains of the political question doctrine: "[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."<sup>40</sup> Finally, in *Japan Whaling Ass'n v. American Cetacean Society*,<sup>41</sup> the Court concluded that

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<sup>36</sup> Gunther, *supra* note \_\_ at 24.

<sup>37</sup> See also Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 138 (2000) ("Over the past three decades, the Court's interventions into structural constitutional review have established it as the undisputed 'referee' for constitutional disputes between the political branches and disputes between the federal government and the states.").

<sup>38</sup> See Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1230-31 (2002) (arguing that silences in *Bush v. Gore* suggests the end of the political question doctrine as a counsel of prudence).

<sup>39</sup> 506 U.S. 224 (1993)

<sup>40</sup> *Nixon*, 506 U.S. at 228-29; see also *767 Third Ave. Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 164 (2d Cir. 2000) ("Although prudential considerations may inform a court's justiciability analysis, the political question doctrine is essentially a constitutional limitation on the courts.").

<sup>41</sup> 478 U.S. 221 (1986).

the interpretation of treaties did not present a political question, but noted the continued relevance of institutional competence factors in making that determination.<sup>42</sup>

In both *Nixon* and *Japan Whaling Association*, the Court applied an institutional competence gloss to its decisions to abstain from an issue on constitutional grounds. As the next part of this Article demonstrates, however, the Court has yet to articulate a coherent set of institutional competence factors to guide its analysis as to when to invoke the political question doctrine in foreign affairs.

#### D. *The Shortcomings in the Court's Formal Criteria for Abstention in Foreign Affairs*

In the modern era, the courts have justified abstention from foreign affairs on the basis of a mixture of rationales derived from the Supreme Court's decision in *Baker v. Carr*, ranging from the "textual commitment of [an activity] to the coordinate branches" to a variety of prudential considerations.<sup>43</sup> Occasionally, the courts have invoked other considerations, such as the concern that the stakes may be too high,<sup>44</sup> the difficulty of access to foreign evidence,<sup>45</sup> and the extreme sensitivity of foreign affairs.<sup>46</sup> None of these factors have proven, however, to be satisfactory. The "textual commitment" prong paints a false picture of the doctrine because the constitutional text does not delegate interpretive authority to any specific branch. On the other hand, *Baker's* prudential factors paint too broad a picture because they do not distinguish which foreign affairs controversies merit abstention under the doctrine, or even why such controversies should be treated any differently from domestic disputes. More specifically, the courts' decisions routinely refer to certain decisions as inappropriate for the judiciary, but they do not explain in any systematic fashion why such decisions, and not others, present such unique challenges to judicial resolution.

##### 1. *The Textual Commitment Prong of the Doctrine*

To inquire, as *Baker* requires, as to whether specific textual provisions commit the resolution of a constitutional issue to a political branch is to assume that such demonstrable textual commitments exist. While this assumption seems reasonable at an abstract level, it becomes less clear when the courts face actual controversies. This is because the constitutional text says little, if anything, about the actual issue of

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<sup>42</sup> *Id.* at 230 (observing that "[t]he Judiciary is particularly ill suited to make [policy choices and value determinations], as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'").

<sup>43</sup> See, e.g., *Schroder v. Bush*, 263 F.3d 1169, 1173-74 (10<sup>th</sup> Cir. 2001); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1312-16 (11<sup>th</sup> Cir. 2001).

<sup>44</sup> See Franck, *supra* note \_\_ at 50-58 (describing and criticizing application of "high stakes" prong of doctrine).

<sup>45</sup> See also *id.* at 46-48.

<sup>46</sup> See *Miami Nation of Indians of Indiana v. Dep't of the Interior*, 255 F.3d 342, 347 (7<sup>th</sup> Cir. 2001)

constitutional interpretation.<sup>47</sup> More importantly, since the entire panoply of all congressional and presidential powers stem from the Constitution, why would certain grants of powers, but not others, be amenable to judicial review?

The textual commitment prong seems most difficult to justify in the context when there is a constitutional challenge to a decision of the political branches. One classic example is when the courts decline to review disputes regarding the allocation of foreign affairs powers.

a. *Allocation of Foreign Affairs Powers*

Some constraints on political branch authority in foreign affairs are constitutionally based. But discerning which branches have the authority to interpret the scope of these constitutional constraints, especially in the foreign affairs context, is far from clear. With certain exceptions,<sup>48</sup> the courts have taken the lead in deciding on the merits those foreign affairs controversies that implicate individual rights,<sup>49</sup> or those that affect federal-state relations.<sup>50</sup> With respect to the division of foreign affairs authority between the President and the Congress, however, the courts have played a minimal, if not a non-existent, role. Indeed, except when such controversies directly implicate individual rights or property interests,<sup>51</sup> the courts have consistently invoked the political question doctrine when asked to adjudicate on separation of powers controversies involving foreign affairs.<sup>52</sup>

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<sup>47</sup> See Barkow, *supra* note \_\_ at 253 (observing that “[t]he Constitution does not contain an express textual commitment of judicial review in the Supreme Court” and thus “it is not surprising that provisions of the Constitution do not explicitly strip the Court of power and vest interpretive authority with Congress or the Executive.”).

<sup>48</sup> See, e.g., *Dickson v. Ford*, 521 F.2d 234, 235 (5<sup>th</sup> Cir. 1975) (declining to review on political question grounds taxpayer challenge to constitutionality of United States military aid to Israel, even though taxpayer was claiming such aid was violative of the First Amendment’s establishment clause).

<sup>49</sup> See *infra* text accompanying notes \_\_

<sup>50</sup> The courts’ treatment of state laws that implicate foreign affairs is subsumed under a doctrinal framework called “dormant foreign affairs preemption.” Under this doctrine, the courts will invalidate a decision of a state if it gets too involved in foreign affairs. See *Zschernig v. Miller*, 389 U.S. 429 (1968) (holding that an Oregon state law that disallowed aliens from communist countries from inheriting property was an “intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress.”). For a critical analysis of this doctrine and an argument that states should have a greater role in foreign affairs, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659-60 (1997).

<sup>51</sup> In the *Steel Seizure* case, for instance, the Court did reject as unconstitutional the President’s decision to nationalize the steel industries without congressional authorization, but the decision focused very much on the fact that the seizure violated individual property rights. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952); see also Ruth Wedgwood, *The Uncertain Career of Executive Power*, 25 YALE J. INT’L L 310, 313 (2000) (“The real lesson of the *Steel Seizure* Case, is . . . that citizens are off-limits. The Constitutionally protected entitlements of citizens, in liberty and property, may sharply limit the domain of presidential foreign affairs powers”).

<sup>52</sup> See *Goldwater*, 444 U.S., at 998; *Made in USA Foundation*, 242 F.3d at 1312; *Mahorner*, 224 F.Supp. 2d at 48.

But in an era where intrusion by the courts into separation of powers controversies in domestic affairs is on the rise,<sup>53</sup> it remains a mystery as to why the courts consistently abstain from similar controversies in the foreign affairs context. Why should a separation of powers controversy over the line-item veto such as the one decided in *Clinton v. New York*,<sup>54</sup> for instance, be treated any differently than a controversy regarding the authority of the President to enter international agreements without the Senate's consent?<sup>55</sup> It does not help matters much to state simply that foreign affairs matters are distinguishable because, as noted in *Baker v. Carr*,<sup>56</sup> such matters are committed to the political branches. The larger question here is not whether a particular foreign policy function is committed to a particular political branch, but which branch has the ultimate responsibility to make that determination? In his dissent in *Goldwater v. Carter*, Justice Brennan, who wrote the majority opinion in *Baker v. Carr*, insisted that such power properly belonged to the courts: "[T]he [political question] doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power."<sup>57</sup> Much of the subsequent academic commentary on this issue has embraced Justice Brennan's view.<sup>58</sup>

In any event, Justice Brennan's reservations on the scope of the doctrine notwithstanding, the question remains as to whether there is any plausible constitutional basis that would justify judicial abstention on interpretive issues in foreign affairs. Significantly, there is no single textual provision that explicitly supports a delegation of interpretive authority in foreign affairs to the political branches. Outside the treaty and war-making provisions, most commentators agree that there are relatively few constitutional provisions that deal explicitly with the allocation of foreign affairs powers.<sup>59</sup>

In the absence of any explicit textual support for the interpretive variant of the political question doctrine, some courts and commentators have relied on historical

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<sup>53</sup> See also Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 138 (2000) ("Over the past three decades, the Court's interventions into structural constitutional review have established it as the undisputed 'referee' for constitutional disputes between the political branches and disputes between the federal government and the states.").

<sup>54</sup> 524 U.S. 417, 446 (1998).

<sup>55</sup> See *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001).

<sup>56</sup> See *Baker*, 369 U.S. at 211 (observing that in addition to being textually committed to the political branches, the "resolution of [foreign affairs] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views.")

<sup>57</sup> *Goldwater v. Carter*, 444 U.S. 996, 1006-07 (1979).

<sup>58</sup> See, e.g., FRANCK, *supra* note \_\_ at 37-38; Glennon, *supra* note \_\_ at 815.

<sup>59</sup> See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231, 236-37 (2001) ("A common tenet of scholars who agree on little else is that once one moves beyond the war and treaty-making powers, the Constitution itself has little to say about the relative roles of the President and Congress, but rather contain substantial gaps that compel resort to other considerations").

practice and structural considerations.<sup>60</sup> But the early constitutional history regarding the scope and application of the doctrine is inconclusive. Although Justice Marshall did occasionally state that the political branches were entrusted with the conduct of foreign affairs to the exclusion of the judiciary,<sup>61</sup> he also seemed to suggest that nothing should stand in the way of an independent judicial determination as to whether a political branch had constitutionally overstepped its foreign affairs powers.<sup>62</sup> Indeed, the latter view has been occasionally supported in dicta by some courts in the modern era.<sup>63</sup> In any event, it was not almost until the civil war that courts started to defer to or abstain from controversies involving the constitutional allocation of foreign affairs authority.<sup>64</sup>

Efforts to use structural inferences to justify the interpretive prong of the political question doctrine fare no better. The commentators who support this approach argue that while constitutional limits regarding individual rights should be entrusted to the courts, the resolution of separation of powers disputes ought to be left to the political branches.<sup>65</sup> According to these commentators, this division of authority can be inferred from the fact

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<sup>60</sup> See, e.g., *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1312 n.27 (11th Cir.2001) (“[W]e believe that history may inform the inquiry inasmuch as it fleshes out the manner in which the executive and legislative branches have sought to exercise and accommodate their textually committed foreign affairs powers over time”); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 157 (1995) (“[S]ince the argument for the power of judicial review is itself a brilliant structural inference supported by historical understanding, the argument for each and every political question exception to Marbury-style review must likewise be largely one of structural inference supported by history and tradition.”); see also Barkow, *supra* note \_\_\_ at 320-21 (discussing structural bases for deference to the political branches).

<sup>61</sup> See *supra* text accompanying notes \_\_\_

<sup>62</sup> In some of the other early constitutional controversies in the Court over the allocation of foreign affairs authority, for instance, Marshall proceeded to reach the decisions on the merits and delimit the relevant political branch’s authority on foreign affairs. See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110, 112(1814) (declaring invalid an executive seizure of British property without congressional authorization during the war of 1812); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (holding that a commander of a ship who, on express instructions from the President, seized a vessel sailing from a French port was liable in damages to any person injured by the seizure, where such seizure was not authorized by Congress).

<sup>63</sup> See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141, 1147-48 (D.D.C. 1990) (opining that the question as to whether the President could commence hostilities in Iraq without a congressional declaration of war did not implicate the political question doctrine, but ultimately dismissing the claim on other justiciability grounds); *but see Campbell v. Clinton*, 203 F.3d 19, 25 (2000) (holding that decision in *Dellums* was mere dicta).

<sup>64</sup> See HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION* 84 (observing that by the mid-eighteenth century, “courts made fewer forays into the area [of foreign affairs] and their ruling grew increasingly deferential to executive prerogative.”); see also *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (finding that the President had discretion to act to protect lives and property of citizens).

<sup>65</sup> See Barkow, *supra* note \_\_\_ at 325 (“[The] structure [of the Constitution] dictates that some questions properly belong to the judiciary. Most fundamentally, the judiciary, because of its independence, is best suited to protect individual liberties from oppression by the majority”); Mulhern, *supra* note \_\_\_ at 164 (proposing a model that distinguishes political questions and those appropriate for judicial review based upon whether the issue involves the protection of individual rights).

that the courts are uniquely positioned to safeguard individual rights because of their independence, and the political branches are better positioned to safeguard separation of powers issues because of their political accountability.<sup>66</sup>

In the abstract, the proposition that the judiciary should focus its resources on protecting individual rights, rather than separation of powers or federalism concerns, seems fairly uncontroversial. Indeed, this notion fits quite nicely with Chief Justice Marshall's loose description of political questions as those "respect[ing] the nation, not individual rights."<sup>67</sup> In practice, however, the line dividing political questions from those subject to judicial review does not lend itself to such an easy fit.

To understand the difficulties inherent in such a dichotomy of the judicial function, it is worthwhile to revisit the thesis of Jesse Choper, who years ago also argued that the courts should abstain from deciding constitutional questions concerning the separation of powers.<sup>68</sup> Choper focused on functional considerations, observing that the courts possessed limited political capital,<sup>69</sup> and that the political branches were capable of protecting their own constitutional interests.<sup>70</sup> Choper's response to the courts' relative lack of political capital was to carve out all constitutional controversies not involving individual rights from judicial review, but he acknowledged that his theory did not meet the formal criteria for non-justiciability under the political question doctrine.<sup>71</sup>

In the end, Choper's efforts to re-conceptualize the role of the federal judiciary proved untenable. As some of Choper's critics observed, two of the key assumptions underlying his theory seemed particularly problematic: (1) that the political branches were capable of reaching the right balance in separations of powers controversies,<sup>72</sup> and

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<sup>66</sup> See Barkow, *supra* note \_\_ at 325-26; Muhern, *supra* note \_\_ at 164-65.

<sup>67</sup> *Marbury*, 5 U.S. (1 Cranch) at 166.

<sup>68</sup> See JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 379 (1980). Building on political safeguards of federalism arguments first advanced by Professor Herbert Wechsler about fifty years ago, Choper also argued that "the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be nonjusticiable." *Id.* at 175; see also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Choper-Wechsler political safeguards of federalism argument was initially adopted by the Supreme Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), but was subsequently rejected by *United States v. Lopez*, 514 U.S. 549 (1995); see also John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997) (arguing that *Garcia* is no longer the controlling theory concerning judicial review of federalism questions).

<sup>69</sup> See CHOPER, *supra* note \_\_ at 129-37.

<sup>70</sup> *Id.* at 379.

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 492 n. 230 (1991) ("[N]either of Choper's fundamental assumptions comports with political and constitutional reality"); see also *Id.* at 492

(2) that the judiciary's political capital was transferable to the political branches.<sup>73</sup> Eventually, it was only a matter of time before the Supreme Court rejected the normative underpinnings of Choper's approach.<sup>74</sup> In handling separation of powers controversies, the courts have instead alternated between a formalistic approach, which takes a strict approach to separation of powers issues,<sup>75</sup> and a functional approach, which focuses on whether the underlying arrangement disturbs the overall balance of power among the different political branches.<sup>76</sup>

Although courts are increasingly reluctant to abstain on separation of powers issues in the domestic sphere, one could argue that Choper's functional concerns may still have special relevance in the foreign affairs context. Professor Yoo seems to have adopted such an approach in his analysis of the judicial role in the allocation of war powers. To summarize, Yoo has argued that courts should abstain from reviewing such questions, "because the Framers intended to establish a self-regulating system wherein the executive and legislative branches would monitor and control each other."<sup>77</sup> Yoo attaches much importance to the fact that Congress can control the executive's war related activities through the power of the purse.<sup>78</sup> But both the courts and commentators have strongly disputed the notion that Congress's power over the purse sufficiently safeguards its constitutional prerogative in foreign affairs.<sup>79</sup> Even if one accepts the normative thrust of

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("If no tendency toward equilibrium can be established, Choper's faith that separation of powers is self-enforcing seems highly questionable").

<sup>73</sup> See *id.* at 492

<sup>74</sup> See *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) ("This Court has repeatedly emphasized that the Constitution diffuses power the better to secure liberty"); Steven G. Calabresi, *The Structural Constitution and the Counter-majoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 3, 4 (1998) (observing that "during the last 25 years--from the Nixon era to the Clinton era--the Supreme Court has come to play a very active non-Choperian role in separation of powers issues, in contrast to the more passive role it played between 1937 and 1974").

<sup>75</sup> See, e.g., *Clinton v. New York*, 524 U.S. 417, \_\_\_ (1998) (holding that line-item veto violated the separation of powers); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 944-51 (1983) (holding that the legislative veto violated the separation of powers).

<sup>76</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 689-96 (1988) ("[T]he real question is whether the removal restrictions [as applied to the independent counsel] are of such a nature that they impede the President's ability to perform his constitutional duty"); *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982) ("[A] court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."). For a detailed analysis of the difference between the functionalist and formalist approach, see M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136-47 (2000).

<sup>77</sup> John Yoo, *The Continuation of Politics by other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 300 (1996); see also *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990) ("Congress possesses ample powers under the Constitution to prevent Presidential over-reaching, should Congress choose to exercise them.").

<sup>78</sup> *Id.* at 295.

<sup>79</sup> See *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C.Cir.1973) (observing that that "[t]his court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war"); see also David Gray Adler, *Court, Constitution, and Foreign*

Yoo's argument, however, it is still not clear why such self-enforcing safeguards would only be relevant in the foreign affairs context.<sup>80</sup> As one other commentator has observed, in the past couple of years there has been "an astonishing revival of judicial, and especially Supreme Court, enforcement of the structural constitution."<sup>81</sup> Why this revival has escaped the foreign affairs realm cannot be simply explained on the basis of "self-regulating" constitutional norms, however, since such norms would presumably apply to domestic affairs disputes.

In sum, whatever the normative merits of Choper's claim, it is indisputable that it fails to give a correct descriptive account of the political question doctrine as currently practiced by the courts. And while it may be true that courts in the modern era have abstained from separation of powers controversies involving foreign affairs, neither Choper's functional approach, nor the structural arguments described above, provides a coherent theory of why the political question doctrine should apply to such cases, but not others.

#### b. *Other Adjudicative Applications*

Even if we exclude allocation of powers disputes from the analysis, the textual commitment prong still fails to provide a coherent explanation for many instances in which the courts invoke the political question doctrine in foreign affairs. Indeed, the most common application of the political question doctrine in foreign affairs involves adjudicative type issues that occur when a political branch is acting within its constitutionally designated role.<sup>82</sup> Subsumed under this category are all those issues that do not involve disputes about which branch has the authority to engage in constitutional interpretation, but nonetheless seem to involve a strong adjudicative element, such as the resolution of disputed factual claims.<sup>83</sup>

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Affairs, in DAVID GRAY ADLER AND LARRY N. GEORGE, EDs., *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19, 32-35 (U. Press of Kansas, 1996) ("[N]o matter how formidable the weapons [of Congress] may appear to be, they are difficult to effectuate"); Koh, *The National Security Constitution*, *supra* note at 133 ("Some legislative restraints are rarely applied simply because they leave members vulnerable to political criticism. Appropriations cutoffs, for example, expose legislators to charges of having stranded soldiers in the field"); Redish, "*If Angels were to Govern*", *supra* note \_\_ at 492 ("But th[e] assumption [that congressional silence signals Congress's approval of executive action is unwarranted] because institutional barriers may prevent Congress from acting despite its disapproval of the President's action.")

<sup>80</sup>See Ku, *supra* note \_\_ at 139 (observing that "[t]here is reason to doubt that the Supreme Court is willing to leave questions of constitutional structure to protection by the political process.")

<sup>81</sup>Calabresi, *supra* note \_\_ at 3.

<sup>82</sup> See, e.g., *767 Third Avenue Assocs.*, 218 F.3d at 164 (successor state liability when foreign state disintegrates); *Can v. United States*, 14 F.3d at 164 (recognition and successor state liability).

<sup>83</sup> According to some commentators, these kinds of disputes can be read as routine instances of constitutional interpretation by the courts, and therefore not political questions. See, e.g., Henkin, *supra* note \_\_ at 610-611. Outside the foreign affairs context, however, the courts regularly resolve disputes of fact or other non-interpretive issues even when the dispute or the non-interpretive issue affects a constitutional allocation of authority to a political branch. Thus, the key question is why the courts

One pertinent example of the application of the question that does not involve allocation of foreign affairs powers between Congress and the President is the recognition of foreign governments.<sup>84</sup> Although the constitutional text does not explicitly address the President's power to recognize foreign governments, courts have routinely held that such authority is implicit in the President's Article II power to appoint and receive Ambassadors.<sup>85</sup> Thus, in principle, the President's authority to recognize foreign governments would seem to exclude any judicial role, and numerous decisions have held as much.<sup>86</sup> In practice, however, certain courts have used various guises to try to contain the effect of presidential recognition or non-recognition of foreign governments, especially when such presidential acts distinguish between *de facto* and *de jure* governments.<sup>87</sup>

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routinely abstain on such non-interpretive issues in the foreign affairs context, but do not do so in the domestic context. For instance, why would a court decline to review the enforcement policies of a federal agency just because it affected foreign affairs, as it did in *Wood v. Verity*, 729 F. Supp. 1324 (S.D. Fla. 1989), where such abstention is unheard of in the domestic context? The answer cannot simply be that it is because the Constitution allocates foreign affairs powers to the political branches. The same Constitution also allocates much of the national domestic policy making to the political branches, yet the courts do not hesitate to review those kinds of questions. See Spiro, *supra* note \_\_ at 677 (observing that "outside of the foreign relations context, those constitutional provisions that seem most amenable to interpretation have not been insulated from judicial considerations").

<sup>84</sup> Other examples in this category include issues such as: the legal authority of the representative of foreign nations to negotiate treaties, see *Doe v. Braden*, 16 How. (U.S.) 635 (1853); the resolution of disputes arising over conflicting claims to territory, see *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet. ) 415, 420 (1839); the determination of the rightful government of a foreign state, see *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) at 420; the resolution of disputed state successorship issues, see *Can v. United States*, 14 F.3d 160, 165 (2d Cir. 1994); and tort suits for damages for United States mining of foreign harbors, see *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736 (S.D.N.Y. 1986).

<sup>85</sup> See *United States v. Belmont*, 301 U.S. 324, 330 (1936) (Executive had sole authority to recognize and negotiate with Soviet government); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (the President is the "sole organ of the nation in its external relations"); *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944) (nonrecognition of foreign sovereign is essential power conferred upon President by Constitution); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204, comment a (1986) (observing that such authority "is implied in the President's express constitutional power to appoint Ambassadors (article II, section 2) and to receive Ambassadors (article II, section 3), and his implied power to conduct the foreign relations of the United States.").

<sup>86</sup> See, e.g., *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive branch of any government conclusively binds the judges, as well as other officers, citizens and subjects of the government"); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137-38 (1938) ("What government is to be regarded as representative of a foreign sovereign state is a political rather than a judicial question, and it is to be determined by the political branch of the government").

<sup>87</sup> According to Black's law dictionary, a *de facto* government is "one that maintains itself by a display of force against the will of the rightful legal government and is successful, at least temporarily, in overturning the institutions of the rightful government by setting up its own in lieu thereof." BLACK'S LAW DICTIONARY 416 (6<sup>th</sup> Ed. 1990). On the other hand, a *de jure* government refers to "a condition in which there has been total compliance with all requirements of law." *Id.* at 425.

One particular technique that certain courts have employed in such cases is to differentiate between the juridical act of recognition by the President and the domestic legal effects of such recognition. For instance, in *Upright v. Mercury Business Machines Co.*,<sup>88</sup> a New York state court adopted a *de facto* analysis in deciding for itself whether to recognize the effects of transactions within East Germany, even though the executive had expressly declined to recognize the East German government at the time. “A foreign government,” the court ruled, “although not recognized by the political arm of the United States Government, may nevertheless have *de facto* existence which is juridically cognizable. The acts of such a *de facto* government may affect private rights and obligations arising either as a result of activity in, or with corporations within, the territory controlled by such a *de facto* government.”<sup>89</sup> By giving legal effect to the actions of the unrecognized East German government, the *Upright* court essentially substituted its own judgment in place of that of the executive branch as to what the legal effects of non-recognition should be.

But if the Constitution grants the President the authority to recognize foreign governments, on what basis may a court assert for itself the power to determine the legal implications of such recognition, especially when such determinations may be contrary to presidential policy? In response, some commentators have argued that the legal effects of the President’s recognition powers are constrained by the norms of international law, and thus the courts should not abstain from addressing these issues under the political question doctrine.<sup>90</sup> According to these commentators, since under international law there is no difference between a *de facto* and a *de jure* government, recognition should be conferred once a foreign government assumes effective control over the government machinery.<sup>91</sup> In the American experience, however, the executive branch does not always adhere to the legal criteria suggested by international law, but instead often uses

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<sup>88</sup> 213 N.Y.S.2d 417 (N.Y. App.Div. 1961). Prior to *Upright*, the New York Court of Appeals gave effect to the nationalization decrees of the Soviet Union, which at the time was not recognized by the Soviet Union. See *Salimoff & Co v. Standard Oil of N.Y.*, 262 N.Y. 220 (N.Y. 1933); *but see* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 292-93 (7<sup>th</sup> Cir. 1990) (deferring to the executive branch’s non-recognition of the Turkish Republic of Northern Cyprus and suggesting that that the *Salimoff* and *Upright* cases were decided wrongly).

<sup>89</sup> *Upright*, 213 N.Y.S.2d at 420.

<sup>90</sup> See, e.g., Edwin M. Borchard, *The Unrecognized Government in American Courts*, 26 AM. J. INT’L L. 261, 261 (1932); see also Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1153-54 (1985) (“The foreign policy area, however, is not wholly within the absolute discretion of the political branches. One function of law is precisely to set boundaries to the political process and to proscribe conduct that is not the legitimate subject of the process. Fundamental norms of international law provide such boundaries.”).

<sup>91</sup> SEE HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 98 (1947); Borchard, *supra* note \_\_ at 261 (“When a government has been successfully established in a country, regardless of the means and regardless of the form of that government, international law presumes that it will be, and must be, accepted as the agent of the state”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203, comment b (observing that “there is a duty to treat as the government a regime that is the government in fact, just as there is an obligation to treat as a state an entity that is a state in fact”).

recognition as a policy tool to signal favoritism or displeasure towards particular regimes.<sup>92</sup> In such circumstances, these commentators argue, the courts should accord very little weight to the executive branch's determinations when deciding the legal effects of recognition.<sup>93</sup>

There is no need for me to address the relative merits of these various positions. What is relevant here is that the criteria for recognition espoused by these commentators and the Restatement seems to be of a kind that is particularly susceptible to judicial resolution. Indeed, once a "political" function touches on questions that are essentially adjudicative in nature, categorical assertions that the courts have no role to play in resolving such questions become more difficult to justify. This is especially true when these questions come up in the context of controversies over which a court has proper jurisdiction, such as tort, contract, or property disputes. In such circumstances, textual inferences about the separations of powers seem weak because one cannot claim that the courts, by adjudicating on the merits of routine legal disputes, are usurping the kind of policy function that normally belongs to the political branches.

Cases like *Upright* demonstrate a tension between the political branches' power to conduct foreign affairs and the power of the courts to make certain factual or legal determinations in the course of resolving disputes under their jurisdiction.<sup>94</sup> After all, both powers appear to be constitutionally based, and the textual language often provides no clear guidance as to why one form of authority should trump the other.

In sum, the courts continue to justify their political question decisions in constitutional terms, often invoking the textual commitment of powers to the political branches. What is lacking, however, is a clear or coherent interpretive theory of constitutional delegation that would account for the courts' actual practice in political question cases, especially those implicating foreign affairs. As demonstrated above, attempts to couch the question in purely textual, historical, or structural terms have proven inadequate. It is not that these foregoing considerations are not relevant, but that on their own they do not sufficiently explain the scope of the political question doctrine. Not surprisingly, in addition to textual or structural considerations, the judiciary has often

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<sup>92</sup> See Note, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT'L L 473, 479 (1989) (observing that "although rhetorically states have generally adhered to a duty to recognize established governments, in actuality they have often used recognition as an instrument of policy"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203, Reporters Note 1 ("United States practice long reflected the view that recognition was not a matter of international obligation but could be granted or withheld at will, to further national policy").

<sup>93</sup> See Borchard, *supra* note \_\_ at 264 ("The necessities of administering justice in a court cannot be made to depend upon whether the executive likes or dislikes one of the parties whose laws or acts require application").

<sup>94</sup> In more recent times, a federal court has ruled that the President's decision not to recognize a foreign state does not necessarily prevent the unrecognized state from having access to U.S. courts. See *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1988).

also relied on considerations of institutional competence and expediency in order to bolster its theory that the constitution requires judicial abstention on separation of powers controversies in foreign affairs.<sup>95</sup> The next section turns to a critical analysis of these other considerations, which the courts and commentators often refer to as comprising the prudential prong of the political question doctrine.

## 2. *The Prudential Prong of the Doctrine*

Strictly speaking, the notion that there may be a prudential strain of the political question doctrine that is wholly distinct from the constitutional strain no longer reflects the current state of the doctrine. As Bickel originally envisioned it, courts would only be entitled to abstain as a matter of prudence, which he assumed would involve case-by-case judgments about the political expediency of judicial intervention.<sup>96</sup> In the modern era, however, courts have usually invoked these so-called prudential factors not for expediency reasons, but rather as institutional competence factors that inform the constitutional strain of the doctrine.<sup>97</sup> The courts have failed, however, to explain adequately the substance and scope of these institutional competence factors. Indeed, in most circumstances, when invoking the doctrine in foreign affairs cases, courts simply recite the litany of *Baker* factors with hardly any analysis.<sup>98</sup>

The most widely cited prudential or institutional competence factor involves the claim that the disputed issue “lacks judicially discoverable and manageable standards.”<sup>99</sup> Critics of the political question doctrine have roundly dismissed this rationale as indefensible and incoherent, observing that the sort of questions that the courts abstain from under the political question doctrine are usually no less susceptible to judicial standards than the other legal questions that the courts routinely address.<sup>100</sup>

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<sup>95</sup> See, e.g., *Made in the USA Foundation*, 242 F.3d at 1313-15 (holding that the lack of judicial expertise in matters involving treaty interpretation supported inference that issue of when a commercial treaty must be approved by the Senate is a non-justiciable political question).

<sup>96</sup> See Bickel, *The Supreme Court, 1960 Term-Forward: The Passive Virtues*, *supra* note \_\_ at 46.

<sup>97</sup> See *Nixon*, 506 U.S. at 229 (“[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”).

<sup>98</sup> See, e.g., *Kwan v. U.S.*, 272 F.3d 1360, 1364 (Fed. Cir. 2001); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985); *Matter of Extradition of Nacif-Borge*, 829 F. Supp. 1210, 1218 (D.Nev.1993).

<sup>99</sup> See *Baker*, 369 U.S. at 217.

<sup>100</sup> See, e.g., Spiro, *supra* note \_\_ at 677 (“The argument that there are no applicable legal standards by which to determine a decision is, first of all, alternatively circular or self-fulfilling. The sorts of issues posed by foreign relations law are not as a matter of legal interpretation inherently different from other questions of law”); see also FRANCK, *supra* note \_\_ at 48-50 (criticizing rationale as not credible); Redish, *supra* note \_\_ at 1046-47 (same); Robert J. Pushaw, *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C.L. REV. 1165, 1176 (2002) (same); Koh, *supra* note \_\_ at 224 (same).

At first blush, one cannot quarrel with the argument that certain constitutional issues, such as those regarding the proper allocation of war-making authority, may seem just as amenable to judicial standards as controversies regarding the scope of the fourteenth amendment equal protection provisions. Indeed, the patchwork of principles and standards that the courts have come up with to guide their decisions on certain domestic constitutional questions, such as due process requirements, suggests that the courts are equal to the task of inventing standards or rules for even the vaguest legal provisions.

On the other hand, however, one could argue that the difficulty in deriving judicial standards in foreign affairs controversies is not necessarily because of the complexity or vagueness of the underlying foreign affairs issues, but because the very nature of most foreign affairs issues is inherently political.<sup>101</sup> The problem with the foregoing analysis is that it seems to conflate the purely discretionary or ministerial foreign affairs powers of the political branches with those powers that implicate the political question doctrine. Where the political branches are free to act without any legal or constitutional constraints, the political question doctrine does not apply and the courts can simply conclude that the political branches have acted within their constitutional authority. Because the political question doctrine comes into play only when there seem to be legal constraints on the authority of the political branches, however, the question remains as to why courts would refuse to adjudicate when these constraints implicate foreign affairs issues, but not in other circumstances. In the end, the “lack of judicially discoverable standards” rationale does not seem on its own to justify the disparate judicial treatment of foreign and domestic disputes.

Equally problematic is the tendency by courts to abstain from foreign affairs controversies, including those involving separating of powers controversies, on the basis that “such questions uniquely demand single-voiced statement of the Government’s views.”<sup>102</sup> The origin of this unitary view of the foreign affairs powers is probably Justice Sutherland’s rumination in *Curtis Wright* that: “[I]n this vast external realm [of foreign affairs] . . . , the President alone has the power to speak or listen as a representative of the nation.”<sup>103</sup> Justice Sutherland’s opinion has been rightly criticized for trying to unmoor the foreign affairs powers from the Constitution.<sup>104</sup> But beyond the problems with Justice

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<sup>101</sup> See, e.g., *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1198 (5<sup>th</sup> Cir. 1978). (holding that it could not resolve a claim that involved a disputed territorial dispute “[b]ecause no law exists binding these sovereigns and allocating rights and liabilities, no method to judicially resolve their disagreements.”).

<sup>102</sup> *Baker*, 369 U.S. at 211; see also *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring) (“In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.”).

<sup>103</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>104</sup> See Koh, *supra* note \_\_ at 94 n. 121 (collecting critical commentary); see also *id.* (“[T]he significant point is that *Curtiss-Wright* painted a dramatically different vision of the National Security Constitution from that which has prevailed since the founding of the Republic”).

Sutherland's normative vision of the role of the executive branch in foreign affairs, there is also the additional problem that his account does not describe correctly the dynamic between the political branches in foreign affairs.

Far from taking a "single-voice" approach to foreign affairs matters, Congress and the President routinely joust for power in foreign affairs matters. For instance, in the post-Vietnam war era, Congress took a range of significant measures to curb executive war-making powers,<sup>105</sup> ranging from the cutoff of funding for the air war in Cambodia,<sup>106</sup> to the termination of military aid to Turkey after it invaded Cyprus.<sup>107</sup> All of these incidents reflect instances where the political branches did not take a cooperative approach to foreign relations issues, even when these issues implicated fairly sensitive national security concerns. Thus, as a practical matter, the "single voiced" rationale reaches too far, because it assumes a picture of our "foreign relations" constitution that simply does not exist. As one commentator has observed, in those instances where the political branches cannot come to agreement over a foreign affairs matter, "other nations are asked to understand our complex constitutional system of checks and balances and somehow we manage to survive as a nation."<sup>108</sup>

Similarly, other rationales, such as those that claim foreign affairs issues are "high stakes" are equally problematic. Far from skirting controversy, the courts often seem perfectly willing to entertain domestic disputes that involve politically sensitive issues.<sup>109</sup> Indeed, the Supreme Court's willingness to engage the most politically contentious issues can be surmised from its recent decisions in the 2000 presidential election disputes.<sup>110</sup> In those cases, the Court confronted a fairly sensitive question regarding the propriety of procedures for selecting presidential electors under Article II of the Constitution, and it appeared perfectly willing to wander into the political thicket. Because of the extreme sensitivity of the issues involved in these cases, many commentators have argued that the Court should have abstained from addressing those issues under the political question

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<sup>105</sup> For a discussion of the resurgence of Congressional power in foreign affairs after the Vietnam war, see John Sparkman, *Checks and Balances in American Foreign Policy*, 52 *IND. L. J.* 434 (1977).

<sup>106</sup> See The Joint Resolution Continuing Appropriations for Fiscal Year 1974, Pub. L. NO. 93-52, § 108, 87 Stat. 134 (1973).

<sup>107</sup> See Pub. L. No. 93-448, §6, 88 Stat. 1363, as amended by Act of Dec. 31, 1974, Pub. L. No. 93-570, §6, 88 Stat. 1867.

<sup>108</sup> See Redish, *supra* note \_\_ at 1052.

<sup>109</sup> See Scharpf, *supra* note \_\_ at 550 (observing that in the most contentious cases, the "Court has time and again put its authority on the line to enforce its understanding of constitutional commands"); Franck, *supra* note \_\_ at 10 ("Stalwart federal judges think nothing of deciding such hot-potato issues as the constitutionality of the lines demarcating congressional or school districts, the hiring practices of fire departments, or standards of admission to medical school. Yet these same judges tend to turn coy when challenged to decide whether a military conflict . . . is lawful when waged by the President without a formal declaration of war *strictly sensu* in accordance with article 1, section 8(11) of the Constitution.")

<sup>110</sup> See *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach Canvassing Board*, 531 U.S. 70 (2000).

doctrine.<sup>111</sup> In any event, the 2000 presidential election cases demonstrate that the courts will not necessarily shy away from resolving legal disputes merely because they touch upon politically controversial issues. Indeed, it is difficult to find any cases in the modern era, including those implicating foreign affairs, where the courts have relied exclusively on such a “high stakes” rationale as grounds for abstaining from a legal controversy.

The other rationales given to justify judicial abstention from foreign affairs issues – the courts’ lack of access to the facts and the risk of embarrassing the political branches<sup>112</sup> – have been sufficiently criticized elsewhere,<sup>113</sup> and most of those critiques do not bear worth repeating here. In any event, as Professor Redish makes clear, these factors do not seem to distinguish adequately political questions from those other decisions that the courts have found justiciable.<sup>114</sup> To be sure, many of these factors may be relevant when courts face controversies that pose a threat to their credibility, but the courts have at their disposal better procedural devices for avoiding such confrontations with the political branches.<sup>115</sup> As Bickel has observed, these devices include a range of other constitutional and prudential limits on the exercise of judicial power such as standing, ripeness, the case and controversy requirement, and the discretionary power to deny certiorari.<sup>116</sup>

## II. A RESPONSE TO THE CRITICS OF JUDICIAL ABSTENTION IN FOREIGN AFFAIRS

Appreciating a vulnerable target when they see one, critics of the political question doctrine have pointed to the inconsistencies in the courts’ existing approach as evidence that the doctrine lacks any justification on constitutional or prudential grounds.<sup>117</sup> As the foregoing analysis demonstrates, however, these critics seem to have done a better job in tearing down the rationales underlying the current approaches to the doctrine than in building up a coherent case for broad judicial involvement in foreign affairs. This Part will begin by evaluating the internationalist critique of judicial

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<sup>111</sup> See Barkow, *supra* note \_\_ at 296 (arguing that the Court should have abstained in the 2000 presidential election cases because “[i]t would be difficult to think of many questions as fundamental and important as the Article II question of how to select the President”); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094-95 (2001) (arguing that entire case was not justiciable); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N. C. L. REV. 1203, 1226 (2002) (observing that most commentators claim that the Article II question in the presidential election cases was a political question) .

<sup>112</sup>See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982) (holding that action challenging American military campaign in El Salvador was non-justiciable because the court lacked resources to resolve disputed issues of fact in that conflict); *Baker*, 369 U.S. at 217 (listing as a factor “ the potentiality of embarrassment from multifarious pronouncements”).

<sup>113</sup> See Redish, *supra* note \_\_ at 1042-43; FRANCK, *supra* note \_\_ at 46-47; 58-60; Koh, *supra* note \_\_ at 221-23.

<sup>114</sup> See Redish, *supra* note \_\_ at 1053-55.

<sup>115</sup> See Scharpf, *supra* note \_\_ at 554; Bickel, *supra* note \_\_ at 111-56.

<sup>116</sup> Bickel, *supra* note \_\_ at 111-56.

<sup>117</sup> See, e.g., Redish, *supra* note \_\_ at 1060 (observing that “[a]ll of the traditionally proffered rationales to justify the doctrine are without merit”); FRANCK, *supra* note \_\_ at 31-60.

abstention in foreign affairs and its call for the complete abandonment of the political question doctrine. It will then describe the response by the international relations school of liberalism and its more narrow recommendation that the scope of the doctrine be severely restricted in foreign affairs disputes, but not abandoned completely. This Part will demonstrate that both of these approaches ignore certain fundamental institutional problems that the courts face when they adjudicate on foreign affairs controversies.

#### A. *The Defects of the Internationalist Approach*

The most pronounced critics of the political question doctrine in foreign affairs tend to embrace an internationalist vision of the role of law in inter-state relations. To these scholars, calls for judicial abstention in foreign affairs are simply calls for the abdication of the rule of law on issues that affect international policy.<sup>118</sup> In other words, these scholars tend to reject the any sharp dichotomy between the role of the rule of law on domestic and international issues.<sup>119</sup>

A major proponent of the internationalist approach and one of the most outspoken critics of judicial abstention in foreign affairs is Professor Thomas Franck. Franck traces the origin of the tradition of judicial abstention in foreign affairs to Chief Justice Marshall's dictum in *Marbury* that the President's actions in foreign affairs "can never be examinable by the courts."<sup>120</sup> According to Franck, the view espoused by Marshall and some of the other early cases relied erroneously on British precedent, which Franck claims introduced into American foreign affairs law "a monarchical notion of indivisible power over foreign affairs."<sup>121</sup> Franck rejects this British tradition as inconsistent with the express constitutional division of foreign affairs powers between the President and Congress.<sup>122</sup>

Although Franck's analysis of the origins of the courts' deference to foreign affairs is illuminating, the implications he draws from it are problematic. Franck insists that the solution to the chaotic treatment courts accord foreign affairs cases lies in the complete abandonment of the political question doctrine.<sup>123</sup> In its place, Franck would substitute a rule where the courts would defer to the political branches' findings of evidence in foreign

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<sup>118</sup> See, e.g., Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 Am. J. Int'l L. 805, 813 (1989) ("[T]here is no basis for a broad rule permitting deference or abstention in cases touching on international law and policy. For the most part, the courts are well equipped to decide them independently. . . . The use of deference or abstention should depend primarily upon the functional demands presented by the specific legal issues and facts before the court. As in all political question cases, the burden should lie heavily upon those urging the judiciary to abdicate its responsibilities."); Thomas M. Franck, *Political Questions/Judicial Answers* 48-49 (1992) (arguing that international law is not an illusion and it provides standards to resolve cases that domestic courts abstain from under the political question doctrine).

<sup>119</sup> See FRANCK, *supra* note \_\_\_ at 49.

<sup>120</sup> See *id.*, *supra* note \_\_\_ at 3 (quoting *Marbury*, 5 U.S. (1 Cranch) at 176).

<sup>121</sup> *Id.* at 12.

<sup>122</sup> *Id.* at 13.

<sup>123</sup> *Id.* at 126.

affairs – a proposal that he models after the German approach.<sup>124</sup> According to Franck, his proposal would remedy both the constitutional and policy defects inherent in the courts' usual practice of abstention in foreign affairs cases.<sup>125</sup> In other words, Franck believes that the rule of law is vindicated only when the courts have the power to adjudicate on the merits of every constitutional dispute, including those implicating foreign policy.<sup>126</sup>

Franck's proposal faces many insuperable obstacles, not the least of which is that he never attempts to explain the source of the judiciary's purported monopoly over constitutional interpretation or adjudicative matters generally. Nothing in the Constitution addresses directly the allocation of interpretive powers amongst the various branches. More importantly, not much in Chief Justice Marshall's opinion in *Marbury v. Madison*, which first established the power of judicial review, suggests that the judiciary ought to exercise the interpretive function to the exclusion of all the other branches. Indeed, as Larry Kramer has recently demonstrated, *Marbury v. Madison* did not in any way embrace the notion of judicial monopoly over constitutional interpretation. "The achievement of judicial review in this early period . . . was a successful bid by judges to an equal place in the scheme--to status as members of a coordinate branch, capable of making and acting upon independent judgments about the meaning of the Constitution. This, in fact, is all that *Marbury v. Madison* actually says or does."<sup>127</sup> Thus, if the Constitution is understood as a framework that allocates some measure of interpretive power to all the branches, the notion of judicial abstention or deference on certain constitutional issues makes sense.

In the modern era, however, the notion that the judiciary is the paramount branch in constitutional interpretation has gained wide currency among the courts and commentators.<sup>128</sup> In *Cooper v. Aaron*, for instance, the Supreme Court took the *Marbury* doctrine one step further and declared, "the federal judiciary is supreme in the exposition of the law of the Constitution."<sup>129</sup> This theory of judicial supremacy has been criticized by a small but growing number of constitutional law scholars, but even these critics concede

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<sup>124</sup> *Id.* at 126-36.

<sup>125</sup> *Id.* at 134.

<sup>126</sup> *Id.* at 125 (observing that "one should not underestimate the salutary effects of this approach on the legal culture of society, manifesting that in government none are omnipotent and that the last word belongs to the least dangerous branch.")

<sup>127</sup> Larry Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 87 (2001).

<sup>128</sup> *See id.* at 6 ("It seems fair to say that, as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course."); *see also* Barkow, *supra* note \_\_ at 300-318 (chronicling the growth of judicial supremacy in constitutional interpretation).

<sup>129</sup> 358 U.S. 1, 18 (1958). Some commentators claim that *Cooper*, and not *Marbury v. Madison*, is the source of our modern notion of judicial supremacy in constitutional interpretation. *See, e.g.*, Kramer, *supra* note \_\_ at 6 ("[I]n the years since *Cooper v. Aaron*, the idea of judicial supremacy . . . has finally found widespread approbation.").

that judicial supremacy is an accurate description of the current norm of constitutional interpretation.<sup>130</sup>

Even if we consider the judiciary as the first among equals in constitutional interpretation, however, it would still not explain why the judiciary should exercise this function to the complete exclusion of the other branches.<sup>131</sup> Indeed, as a matter of institutional design, the courts are poorly equipped to address many constitutional questions. For instance, in addition to the case and controversy requirement, a host of other procedural and constitutional hurdles like standing, the power of Congress to control the jurisdiction of federal courts, ripeness, and deferential standards of review guarantee that only a limited number of constitutional controversies ever end up before the courts.<sup>132</sup> As a practical matter, this means the political branches will often play a more significant role than the courts in resolving many constitutional controversies. Indeed, these obstacles to judicial review tend to be even more pronounced in the foreign affairs realm,<sup>133</sup> which means that even if we exclude the political question as a consideration, the opportunity of the courts to adjudicate on foreign affairs controversies would still be fairly limited.

In addition to the institutional considerations described above, other factors bolster the justification for an independent political branch review of certain constitutional questions. Like the courts, the political branches also have an obligation to conform their actions to the dictates of the Constitution. Courts have recognized that this obligation entails a measure of judicial deference to the judgment of the political branches on constitutional questions.<sup>134</sup> Importantly, this deference signifies that even in the post-

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<sup>130</sup> See, e.g., Kramer, *supra* note \_\_ at 7 (observing that “there is . . . a not insubstantial literature decrying the Court’s pretension to have a final say on constitutional meaning.”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (developing a populist approach to constitutional interpretation that gives no special normative weight to judicial interpretations of the constitution); Barkow, *supra* note \_\_ at 320 (criticizing growing trend of judicial monopoly in constitutional interpretation).

<sup>131</sup> See Kramer, *supra* note \_\_ at 13 (contending that the issue of judicial supremacy does not entail judicial exclusivity).

<sup>132</sup> In addition to these procedural devices, one can also make the argument that the political branches possess certain institutional advantages in terms of resources for resolving constitutional controversies. See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1278 (2001) (“The massive scale of the political branches relative to the judiciary-- measured in resources, personnel and organizational capacities-- ensures that, across a broad range of constitutional questions, the legislative process rather than the Court has de jure or de facto authority to decide constitutional questions.”).

<sup>133</sup> See HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 142 (observing that “most of foreign policy . . . including most acts that have raised serious constitutional issues, do not impinge directly on constitutional interests.”).

<sup>134</sup> See, e.g., *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“Congress, like the Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”).

*Cooper* era, the courts recognize that constitutional interpretation continues to be a joint enterprise amongst the three branches of government. As put by the Supreme Court in *Nixon v. United States*, “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”<sup>135</sup>

In light of all these considerations, the assumption of judicial monopoly implicit in Franck’s analysis does not match up with the reality of American constitutional practice. Significantly, far from simply being a judicial aberration foisted upon the American legal structure by judges sympathetic to a monarchical legal system, the political question doctrine fits rather comfortably within a legal tradition where the courts simply do not have either the resources or the opportunity to resolve all constitutional controversies. Hence, rather than treat the political question doctrine as simply a constitutional aberration, the proper analysis would ask which branch is in a better position to perform the relevant adjudicative or interpretive function. This is especially true in the context of foreign affairs where there has been a long tradition of judicial deference to the political branches. The real challenge is, of course, to come up with a more coherent framework than is currently available for distinguishing those foreign affairs controversies that properly qualify as political questions from those that do not. On this particular issue, Franck’s approach provides little or no guidance.

Curiously enough, Franck does seem to concede that the courts may have at least one institutional disadvantage *vis a vis* the political branches in foreign affairs issues. He couches this disadvantage in “evidentiary” terms, however, which he claims involve the difficulties courts face when “drawn into an assessment of those rather special circumstances that constitute the field of international relations.”<sup>136</sup> Drawing upon the experience of German courts, he argues that courts could overcome these difficulties if they reformulate political questions as evidentiary problems, which the courts would then review under a deferential standard.<sup>137</sup>

It is not clear, however, what Franck really makes of the evidentiary obstacles he believes the courts face in foreign affairs, or how his proposal addresses these evidentiary problems. For instance, is it his theory that if the judiciary had access to evidence discussing the underlying causes of the Vietnamese civil war, including the influence of communist ideology, that it would be in a better position to decide whether the executive branch’s undeclared war in Vietnam was a constitutionally acceptable option? What of the issue of how to deal with the legal implications of state succession, or the recognition of foreign governments? Is Franck suggesting that if the judiciary had more evidence from the political branches regarding the causes of the dissolution of Yugoslavia at the end of the cold war, it would be better positioned to decide whether Slovenia or Croatia should

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<sup>135</sup> *United States v. Nixon*, 418 U.S. 683, 703 (1974).

<sup>136</sup> FRANCK, *supra* note \_\_ at 130.

<sup>137</sup> *Id.* at 130-31.

accede to the sovereign debts of the former Yugoslavia, rather than Bosnia-Herzegovina?

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The precise foundation of Franck's assumption is unclear, but his proposal to convert the political question doctrine to an evidentiary standard turns out to be a makeweight solution. Franck concedes that the German model he espouses so generously does not necessarily produce outcomes that are significantly different from what occurs currently under the American system. Apparently, although the German courts claim to adjudicate on the merits, they rarely ever set aside the decisions of the political branches in foreign affairs. As Franck observes: "In its theoretical pronouncements, neither [the American or German] judiciary is candid about what it is doing. The German judges sound more assertive, just as their American counterparts . . . , than they really are."<sup>139</sup> Nonetheless, Franck still thinks the German system is preferable because "it provides a thread of jurisprudence that is pursued with far greater consistency than in the American practice."<sup>140</sup> If this is true, however, then Franck's seeming infatuation with the American model is puzzling. Why would he recommend a wholesale dismantling of a doctrine with a rich historical lineage, simply to replace it with another that is just as ineffectual?

Furthermore, Franck's suggested antidote to the evidentiary problem underscores the difficulty of judicial involvement in foreign affairs. For instance, upon closer examination, it becomes evident that Franck is not so much concerned with the evidentiary difficulties courts face in foreign affairs as he is concerned with the kind of policy judgments that political actors exercise when they are faced with certain kinds of evidence.<sup>141</sup> Whether those policy judgments are inappropriate, however, depends in turn on some kind of understanding of how different state actors interact in the international environment. But who has the capacity to understand better how states interact in the international system -- the political branches or the courts? Or put differently, are courts properly equipped to decipher whether there is a proper fit between the evidence in a foreign affairs dispute and the kind of norms that govern the interaction of states at the international level? Ultimately, Franck does not address the competency of the courts to make these sorts of determinations.

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<sup>138</sup> The recovery of the sovereign debts of the former Yugoslavia from its successor states was the issue in *767 Third Ave. Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2nd Cir. 2001). The Second Circuit declined to resolve the issue on the grounds that it was non-justiciable under the political question doctrine. *Id.* at 159-60. For a general discussion of the breakup of Yugoslavia and some of its legal implications, see Carsten T. Ebenroth & Matthew J. Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 796-99 (1996).

<sup>139</sup> FRANCK, *supra* note \_\_ at 124.

<sup>140</sup> *Id.* at 107.

<sup>141</sup> Ultimately, Franck frames the underlying issue as one involving judicial review of the propriety of the political branches' actions in foreign affairs: "[H]ow ready should judges be ready to entertain, and be persuaded by, evidence that particular means chosen by a political branch were less than compelled by the circumstances or that other, less legally or constitutionally objectionable means might have accomplished the same or 'equivalent' ends?" FRANCK, *supra* note \_\_ at 131.

B. *The Liberalist Response and its Limitations*

While internationalists like Franck would prefer to see the courts eliminate the political question doctrine in foreign affairs, other commentators have suggested that a more moderate approach: that the doctrine remain but that the scope of its application be substantially curtailed in foreign affairs disputes. One prominent school of thought that advocates this middle-of-the-road approach is the international relations school of liberalism.<sup>142</sup> At the heart of liberalist approach is the belief that liberal states interact with each other under a framework of “complex interdependence,” in which the various “societies” are “connected by ‘multiple channels’ of communication and action that are ‘transgovernmental’ rather than formally ‘interstate.’”<sup>143</sup> Among such states, the liberalists contend, “foreign and domestic issues are most convergent,” thus, the courts in such states should not defer to the political branches on issues involving other liberal states.<sup>144</sup>

Liberalists recognize, of course, that there are competing alternative explanations of the international society of sovereign states.<sup>145</sup> One such competing approach has been the international relations school of realism, which has been the dominant approach to approach in the United States over the past two millennia.<sup>146</sup> The realist approach “accept[s] a model of states as unitary actors whose external behavior is unrelated to unitary structure and purpose.”<sup>147</sup> Liberalists reject the fundamental tenets of realism when it comes to describing the interaction among liberal states, but concede that non-liberal states interact with each other and liberal states under a framework that “conform[s] much more to the traditional realist mode.”<sup>148</sup> Thus, according to the liberalists, courts should continue to apply the political question doctrine to foreign affairs disputes that involve non-liberal states.<sup>149</sup>

To a certain degree, the liberalists are correct that international relations theory can help us understand why courts treat foreign affairs differently from domestic issues. For instance, if you take a realist perspective of the international environment, then it is pointless to advocate judicial intervention in foreign affairs because the model of the world you are using eschews the significance of any kind of legal norms or principles.

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<sup>142</sup> One of the most proponents of the liberalist school is Anne-Marie Slaughter Burley. See Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 Harv. L. Rev. 1980, 1999-2001 (1993); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1916- 23 (1992); see also Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1151 (1986).

<sup>143</sup> See Slaughter, *Are Foreign Affairs Different*, *supra* note \_\_\_ at 2002.

<sup>144</sup> See Slaughter, *supra* note \_\_\_ at 2002.

<sup>145</sup> See Slaughter, *supra* note \_\_\_ at 2001.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1999 (also listing major works of realism).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1999-2000.

Indeed, in invoking the political question doctrine, some courts have relied explicitly on a realist vision of international politics. In a recent Seventh Circuit case discussing the political question doctrine, for instance, Judge Posner opined that the conduct of foreign affairs involved “the unjudicial mindset that goes by the name Realpolitik.”<sup>150</sup>

Assuming the liberalist description of international society is correct, however, it is still not altogether clear why the courts should play any more of a significant role in foreign affairs. Indeed, the liberalist project runs up against a fundamentally intractable problem: Who gets to decide whether or not a country qualifies as a liberal state? The liberalists seem to assume that the courts should make these determinations.<sup>151</sup> But what exactly would be the basis for granting the courts such broad policymaking power? Nothing in Article III would seem to support vesting such foreign affairs power in the judicial branch. Moreover, from an institutional competence standpoint, it would also not make much sense to give the courts the authority to determine whether or not a specific country meets the liberalist’s criteria for liberalism. Finally, there is hardly any historical precedent that would support such a broad expansion of the judicial function. The liberalists claim that the courts already make similar distinctions when they have to assess the adequacy of foreign forums in *forum non conveniens* cases.<sup>152</sup> But this comparison crumbles upon closer inspection. In determining whether or not to refrain from hearing a case because of the availability of a better alternative forum, a court may consider whether “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>153</sup> However, that kind of determination is a far cry from a court making a policy determination that a specific country’s political and economic system does not sufficiently meet some undefined and invariably subjective threshold of liberalism.

In any event, even if the courts could make these kinds of determinations, it is still unclear why it would make sense to do away with the political question doctrine only with respect to issues that concern liberal countries, and not others. As an example, let us examine one scenario where the political question doctrine frequently comes up: the recognition of foreign governments. Assume, for a moment, that Basque separatists in Northern Spain succeed briefly in their quest to secede and set up an interim

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<sup>150</sup> *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001). In *Occidental of Umm al Qaywayn*, the Fifth Circuit also adopted a realist approach in its decision to abstain from a controversy that implicated a territorial dispute between sovereigns:

In their external relations, sovereigns are bound by no law; they are like our ancestors before the recognition or imposition of the social contract. A prerequisite of law is a recognized superior authority whether delegated from below or imposed from above where there is no recognized authority, there is no law. Because no law exists binding these sovereigns and allocating rights and liabilities, no method exists to judicially resolve their disagreements.

577 F.2d at 1204-05.

<sup>151</sup> *Id.* at 2003

<sup>152</sup> *Id.*

<sup>153</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (1981).

government, but their short-lived secession is crushed violently by the Spanish military. The President of the United States then decides that because of Spain's actions he or she is no longer going to recognize the Spanish government. Should a court, in the course of a legal dispute that involves the Spanish government, be able to set aside the President's non-recognition decision if it makes an independent determination that Spain is a liberal country? I do not think that even the most ardent opponent of the political question doctrine would agree that courts should have that kind of authority.<sup>154</sup>

The liberalist approach does not seem to fare any better when applied to other issues, such as the executive branch's war-making powers. For instance, why should the courts intervene if the President decides to launch an undeclared military campaign against a liberal country, but then abstain if the President decides to take a similar action against a non-liberal state? Assuming that the perceived threat to national security is the same in both instances, is there anything inherent in liberalism that would make a declaration or congressional approval necessary in one context, and not in the other? In the end, using a dichotomy between liberal and non-liberal states to narrow the scope of the political question doctrine, as the liberalist proposes, would likely raise more problems than does exist under the current doctrine.

### III. A BALANCE OF INSTITUTIONAL COMPETENCIES APPROACH

This Part proposes a balance of institutional competencies approach to the political question doctrine in foreign affairs. When judicial abstention and deference in foreign affairs is understood through the prism of the balance of institutional competencies, its contours become clearer and more logical. As used here, a balance of institutional competencies model envisions that when faced with a foreign affairs controversy, the courts weigh their institutional advantage in resolving certain kinds of disputes against that of the political branches before deciding on the appropriate amount of deference to accord the political branches' judgment.

For several reasons discussed in Section A below, a balance of institutional competencies approach provides the most coherent explanation for the pervasive application of the political question doctrine in foreign affairs. But while the courts have often invoked institutional competence factors in deciding whether to abstain from foreign affairs controversies, they have often done so at a level of generality that does not provide a meaningful basis for discerning the scope of the doctrine. That the factors the courts consider in invoking the doctrine may prove inadequate does not mean, however, that no principled basis for distinguishing political questions exists. At a fairly abstract level, one can be reasonably sure that any explanation will rest on some notion of the impropriety of judicial involvement due to the substantive nature of the underlying dispute.

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<sup>154</sup> For instance, Franck concedes that the courts should not have such powers. See FRANCK, *supra* note \_\_ at 6 ("The judicial function is both separate and of an entirely different from the executive's prerogative to determine which foreign governments to recognize.").

Section B shows that a balance of institutional competencies also provides a definition of the proper scope of abstention and deference among different foreign affairs controversies. Rather than treat the judicial doctrines of abstention and deference as differences in kind, this section demonstrates that these two doctrines reflect differences in degree.

A. *The Comparative Institutional Disadvantages of the Courts*

As compared to the political branches, the courts suffer from clear institutional disadvantages in resolving constitutional foreign affairs controversies, including controversies regarding the allocation of foreign affairs powers. These include: (1) obstacles to a judicial definition of the scope of foreign affairs powers; (2) the lack of judicial authoritativeness in resolving foreign affairs controversies; and (3) the fact that the costs of judicial intervention in foreign affairs outweigh the benefits.

1. *Obstacles to a Judicial Definition of the Scope of the Foreign Affairs Powers*

One of the most obvious and persistent problems in judicial interpretation of the constitutional foreign affairs powers concerns the role of definition. In other words, the Constitution is unambiguously silent as to the meaning of the relevant terms that define the scope of the foreign affairs powers, such as “war” or “treaties.” Furthermore, the Supreme Court has yet to supply its own understanding of what these terms mean from a constitutional standpoint.<sup>155</sup> Understandably, without the benefit of any guidance as to the definition of these terms, lower courts have been reluctant to resolve controversies regarding the constitutional allocation of the foreign affairs powers. Perhaps this explains why, in refusing to hear such controversies, the courts often declare that the underlying issues involve the “lack of judicially manageable or discoverable standards.”<sup>156</sup>

In many respects, it is not difficult to understand why the courts have balked at imposing any substantive limitations on the scope of the foreign affairs powers. The political branches have a demonstrable institutional advantage over the courts in understanding the international political norms that inform the substantive meaning of the various terms underlying the foreign affairs powers. The early constitutional history of the foreign affairs powers strongly suggest that the framers understood the constitutional meaning of these terms would be consistent with that of early British constitutional

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<sup>155</sup> See *Made in the U.S.A. Foundation v. U.S.*, 242 F.3d at 1305 (“Remarkably, although perhaps not altogether surprisingly, the United States Supreme Court has never in our nation’s history seen fit to address the question of what exactly constitutes and distinguishes “treaties,” as that term is used in Art. II, § 2, from “alliances,” “confederations,” “compacts,” or “agreements,” as those terms are employed in Art. I, § 10”); see *Campbell v. Clinton*, 203 F.3d at 26-27 (surveying the case law and observing that no court had attempted to define the constitutional meaning of war).

<sup>156</sup> See, e.g., *Made in the U.S.A. Foundation*, 242 F.3d at 1315 (holding that difficulty in defining treaty suggested that resolution of dispute was not amenable to judicially manageable standards).

practice and the prevailing international norms at the time.<sup>157</sup> In the international context, however, the meanings of these foreign affairs terms are dynamic and tend to evolve with changing conditions and the demands of the international environment. Since the political branches are better suited than the courts in tracking these norms, it makes sense that the courts would also defer to the political branches' understanding of the scope of the foreign affairs powers. More importantly, as a descriptive matter, many of the disputes that implicate foreign affairs involve considerations of "realpolitik" that are largely absent in domestic controversies.

The original meaning of the constitutional foreign affairs powers can be gleaned from the works of leading eighteenth century international law scholars, such as Emmerich de Vattel, Hugo Grotius, and William Blackstone.<sup>158</sup> These early writers justified an understanding of the foreign affairs powers that was connected to the prevailing international norms of the eighteenth century. For instance, Blackstone, Vattel, Grotius, and Pufendorf all viewed the "Declare War" provision as instrumental to determining whether a hostility was truly public and hence eligible to be governed by the customary laws of war.<sup>159</sup> Accordingly, these authors made a distinction between armed hostilities that the sovereign state enters into as a public unit and armed actions of private groups commonly known as privateers.<sup>160</sup> This distinction was particularly important

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<sup>157</sup> See John Yoo, *The Continuation of Politics by Other Means*, 84 Cal. L. Rev. 167, 204 (1996) ("[A]s former subjects of the British Empire, the Framers operated within its intellectual, constitutional, and legal context. Not only did the British constitution provide concepts and phrases, such as 'commander-in-chief,' 'executive power,' and 'Declare War,' that the Framers imported into their new plan on government, but recent British political history provided a track record of how the distribution would work in practice.") Other than British commentators like Blackstone, however, the founding fathers also consulted the works of a range of European continental thinkers, including earlier writers like Pufendorf and Grotius, on matters of international law and international affairs generally. See Charles Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L. J. 672, 689 (1972).

<sup>158</sup> See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. at 271 ("These authorities were widely known, read, and cited in eighteenth-century America"); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1987 (1999) ("On questions concerning international law, the Framers first would have turned to the well-known publicists Hugo Grotius and Emmerich Vattel. Their treatises were a regular resource both for the Framers and for English legal authorities, such as William Blackstone, to whom the revolutionary generation looked for guidance."); David M. Golove, *Against Free Form Formalism*, 73 N.Y.U. L. REV. at 1874 ("Perhaps in this respect the Framers were influenced by their reading of Vattel, who argued in 1758 that the treaty power belongs to those in whom the sovereignty of the state ultimately resided").

<sup>159</sup> See SAMUEL PUFENDORF, ON THE LAW OF NATURE AND NATIONS 1307 (Clarendon 1934) (1688, C. & W. Oldfather, Trans); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 57-58 (1625 J. Barbeyrae tran. 1738); EMMERICH DE VATTEL, THE LAW OF NATIONS 399 (T. & J.W. Johnson 1863) (Joseph Chitty, ed); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW ON ENGLAND 244-49 (Chicago 1979); see also Yoo, *supra* note at 242 ("[T]he primary function [of a declaration of war] was to trigger the international laws of war, which would clothe in legitimacy certain actions taken against one's own enemy citizens.").

<sup>160</sup> Blackstone describes the importance of this signaling function in great detail:

[T]he reason why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which

because privateers did not enjoy the same protections that were normally accorded lawful combatants in a state of war, which included immunity from prosecution for activities that would otherwise be considered criminal in peacetime.<sup>161</sup> Indeed, as Blackstone described it, such “unauthorized [private] volunteers” were to be treated no differently than “pirates and robbers.”<sup>162</sup> Blackstone recognized one exception, however, where a sovereign might sanction private hostilities under international law. Letters of marque and reprisal were available in circumstances where “the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs.”<sup>163</sup> If such a letter was issued, the recipient could “seise the bodies or goods of the subjects of the offending state, wherever they be found, until satisfaction be made.”<sup>164</sup>

As espoused by these commentators, however, the international norms governing the meaning of these foreign affairs terms were not static. Indeed, with the passage of time and a changing international environment, the meaning of some of these terms evolved considerably, or even became obsolete. For instance, the granting of letters of marque and reprisal became proscribed under international law in the early part of the nineteenth century.<sup>165</sup> Finally, the notion of what a “declared war” entails has also evolved considerably. For instance, one commentator has argued that that in the eighteenth century declarations “generally meant formal announcements to the enemy with proper

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is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king’s authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. 1 BLACKSTONE, *supra* note \_\_\_ at \*249-50.

<sup>161</sup> See, e.g., *Freeland v. Williams*, 131 U.S. 405, 416 (1889) (“[F]or an act done in accordance with the usages of civilized warfare and by military authority of either party, no civil liability United States v. Lindh, 212 F.Supp. 2d 541, 553-54 (E.D. Va. 2002) (“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent’s municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict.”)

<sup>162</sup> BLACKSTONE, *supra* note \_\_\_ at \*249-50.

<sup>163</sup> *Id.* at 250.

<sup>164</sup> *Id.*

<sup>165</sup> See Comment, *Putting Privateers in their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954-55 (1997) (observing that United States has not issued a letter of marque and reprisal since the war of 1812 and that an 1856 international treaty banned such letters); Golove, *Against Free Form Formalism*, 73 N.Y.U. L. REV. 1791, 1859 n. 209 (“[T]he now obsolete power to grant letters of marque and reprisal might well be limited to a formal power to issue documents having a special significance in international law circa 1787”); but see Jules Lobel, “*Little Wars*” and the Constitution, 50 U. MIAMI L. REV. 61, 66-70 (1995) (claiming that the Congressional authority to grant letters of marque and reprisal power implies Congressional power over covert actions).

ceremony, usually in his capital.”<sup>166</sup> But this understanding did not even govern the meaning of war at the time of the founding.<sup>167</sup> More significantly, as a matter of historical practice, Congress has rarely exercised its constitutional authority to declare war.<sup>168</sup> Thus, for all practical purposes, the “declare war” clause has very much evolved into a mere constitutional formality.

The constant evolution in international norms underscores the comparative institutional incompetence of the courts in interpreting the allocation of foreign affairs powers. Importantly, although the proponents of judicial supremacy have offered a variety of justifications as to why courts are institutionally superior to the political branches in constitutional interpretation, none of those justifications seem to apply here. For example, Professors Alexander and Schauer argue that we should prefer the Supreme Court over Congress because the settlement function requires stability “over time as well as across institutions,” and that courts respect the principle of *stare decisis* while Congress does not.<sup>169</sup> Not many would quarrel with this description of the institutional differences between the Court and the political branches. What is less obvious, however, is how these differences translate into an institutional advantage when the interpretive task involves defining the scope of the foreign affairs powers. Indeed, given the fluidity with which the international norms that inform our foreign affairs powers change over time, these factors may very likely prove to be a significant institutional liability. Stability may very well prove to be important in a context where individual rights are at stake. In such circumstances, stability “provides the benefits of authoritative settlement, as well as the related . . . benefits of inducing socially beneficial cooperative behavior and providing

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<sup>166</sup> Jules Lobel, *War-Making Under the Constitution: The Original Understanding*, *supra* note \_\_ at 691.

<sup>167</sup> *Id.*

<sup>168</sup> See John C. Yoo, *Applying the War Powers Resolution to the War on Terrorism*, 6 GREEN BAG 2d 175, 179 (2003) (“Although U.S. Armed Forces have, by conservative estimates, been deployed well over a hundred times in our Nation’s history, Congress has declared war just five times.”). See generally Congressional Research Service, Library of Congress, *Instances of Use of United States Armed Forces Abroad, 1798-1999* (1999); Dep’t of State, Historical Studies Division, *Armed Actions Taken by the United States Without a Declaration of War, 1789-1967* (1967); J. T. Emerson, *War Powers Legislation*, 74 W.VA. L. REV. 53, 88-119 (1972) (documenting 199 U.S. military involvements between the 1798 and 1972 that did not involve a declaration of war). Indeed, in the 100 years preceding the Constitutional Convention, declared conflicts were already fairly uncommon. See ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND THE CONSTITUTION* 56 (citing J. MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR* (1883)).

<sup>169</sup> Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1372-75 (1997); see also Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 464 (2000). Other judicial supremacy proponents have also emphasized the stability factor as an institutional advantage that courts have over the political branches. See Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 514 (1999) (“Most importantly, unlike congressional and presidential interpretations of the Constitution, these judicially created rules are not ad hoc (at least in principle they are not). Lower federal courts and state courts must follow them in like cases, and, of equal importance, they will be followed as precedent by the Supreme Court under the doctrine of *stare decisis*.”).

solutions to Prisoner's Dilemmas and other problems of coordination."<sup>170</sup> In the context of foreign affairs, however, an authoritative settlement of the law across time and institutions is less likely to produce the optimal interpretive outcome. Rather, it will likely result in a constitutional straight-jacket over the decision-making space of the political branches in the international arena.

On the other hand, because the political branches are not bound by the same institutional constraints the courts face, they are better positioned to respond to changing norms in international relations. As one commentator has observed, "Congress . . . frequently makes determinations as to the shifts in public opinion, beliefs, and ideals. Because of Congress's structural superiority in these tasks, it should take a larger role in interpreting those clauses of the Constitution that are meant to evolve over time."<sup>171</sup> Similarly, in the context of executive interpretation of constitutional provisions involving foreign affairs, Professor David Strauss stresses that courts should defer to executive pronouncements on foreign affairs because the courts "lack[] the capacity to make the necessary judgments."<sup>172</sup>

The close relationship between the constitutional foreign affairs powers and the norms of international law also highlights the need for judicial restraint in foreign affairs controversies. As suggested above, the substantive meaning of the underlying foreign affairs powers can only be understood in the context of international law norms. Since the Supreme Court's decision in *Paquette Habana*,<sup>173</sup> however, courts have recognized that the political branches are not compelled by the Constitution to comply with international law.<sup>174</sup> Given this reality, it would be anomalous if the courts, while interpreting the scope of the foreign affairs powers, were able to compel the political branches to comply with customary international law. For instance, it would be clearly inappropriate for a court to override an executive branch decision not to recognize a foreign state if such a court makes an independent determination that the executive branch's decision did not conform to customary international law.<sup>175</sup> Indeed, even opponents of the political question doctrine, such as Louis Henkin, concede that it would be inappropriate for the

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<sup>170</sup> Alexander & Schauer, *ExtraJudicial Constitutional Interpretation*, supra note 31, at 1371.

<sup>171</sup> Neal K. Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L. J. 1335, 1341 (2001).

<sup>172</sup> See Strauss, supra note \_\_ at 118.

<sup>173</sup> 175 U.S. 677, 700 (1900) (observing that the "rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, *in the absence of any treaty or other public act of their own government* in relation to the matter.") (emphasis added).

<sup>174</sup> See, e.g., *Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996) (holding that where "a controlling executive or legislative act does exist, customary international law is inapplicable"); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (holding that, as a matter of U.S. law, a president may, in exercise of the president's foreign affairs powers, indefinitely detain refugees even if such action violates customary international law).

<sup>175</sup> For a discussion of some of the justiciability problems posed by executive branch recognition of foreign states, see text accompanying supra notes \_\_.

courts to invalidate foreign affairs decisions of the political branches on the grounds that such decisions violate international law.<sup>176</sup>

The positive reality of the international political environment supports the institutional analysis that questions regarding foreign affairs are to be resolved by the political branches, not the courts. In particular, an analysis of how states interact in the international realm suggests that some of the international norms may be of a non-legal character. As used here, “international norms” loosely connotes a shared understanding among the international community as to the norms that govern their interactions. It is important to note, however, that a positive description of the norms of international behavior among nation states may often deviate significantly from the prescriptive norms of international law.<sup>177</sup> Indeed, the prevailing political science model of international relations of realism eschews the significance of international law as a factor in describing how states interact. According to realists, the international political realm is characterized by anarchy and involves a “brutal arena where states look for opportunities to take advantage of each other, and therefore have little reason to trust each other.”<sup>178</sup> Realism views the international society of states through the prism of anarchy in which each state strives for its “own preservation and, at a maximum, drive for universal domination.”<sup>179</sup> To the realist, international law does not play an autonomous role in influencing state behavior, but merely reflects the interests of the dominant states in the international arena.<sup>180</sup> Realism has come under increasing scrutiny lately by alternative theories seeking

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<sup>176</sup> See Henkin, *Foreign Affairs and the US Constitution* 146 (“The President (or the Congress) was not constitutionally forbidden to make a claim (as to the sovereignty of a foreign power)

<sup>177</sup> See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999) (arguing that the traditional accounts of customary international law fail to account for patterns of state behavior) [hereinafter *Theory*]; see also Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639 (2000) (same). The observations by these commentators were not entirely novel. For example, a 1912 Report by the Solicitor at the Department of State quotes a leading international law scholar on the distinction between international law and international practice with respect to norms governing intervention:

We can generally deduce the rules of international law from the practice of states; but in this case it is impossible to do anything of the kind. Not only have five different states acted on different principles, but the action of the same state at one time has been irreconcilable with its actions at another. On this subject history speaks with a medley of discordant voices, and the facts of international intercourse give no clue to the rules of international law.

Right to Protect Citizens in Foreign Countries by Landing Forces: Memorandum by the Solicitor for the Department of State 3-4 (3d rev. ed. 1934) (quoting T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 116 (1895)).

<sup>178</sup> John J. Mearsheimer, *The False Promise of International Institutions*, *Int’l Security*, Winter 1994-1995, at 9.

<sup>179</sup> KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 118 (1979)

<sup>180</sup> See Jack L. Goldsmith & Eric A. Posner, *Theory*, *supra* note \_\_ at 1115 (“States do not comply with norms of CIL because of a sense of moral or legal obligation; rather, their compliance and the norms themselves emerge from the states’ pursuit of self-interested policies on the international stage.”); See Mearsheimer, *supra* note \_\_ at 7 (“Realists maintain that institutions are basically a reflection of the distribution of power in the world. They are based on the self-interested calculations of the great powers,

to explain the structure of international politics.<sup>181</sup> One does not have to be a proponent of realism, however, to recognize “the fact that the international legal system, lacking a centralized enforcement body with reliable coercive authority, must depend upon politics for its efficacy far more than does any body of domestic legal rules.”<sup>182</sup>

In the sense that the terms of the foreign affairs powers depend on evolving norms that develop in an international system characterized by anarchy and not hierarchy, they are significantly different from other domestic constitutional provisions. Because nation states in the international context do not face the same kinds of binding legal constraints as domestic actors, they often require a much more flexible policy space in which to address the exigencies of the state’s existence in the international realm. Importantly, unlike in the foreign affairs realm, the political branches are not usually allowed to pursue pure political expedience in the domestic context by privileging one interest group over another.<sup>183</sup> This distinction implies that, unlike the domestic context, the legal and political atmosphere in which foreign policy decisions are made is often not amenable to judicial resolution.

Opponents of the special deference courts pay the political branches in foreign affairs are quick to point out, however, that the courts have managed to derive judicially manageable standards from the vaguest and most complex domestic legal provisions.<sup>184</sup> This kind of reasoning obscures the issue. The difficulty in deriving judicial standards in foreign affairs controversies is not necessarily due to the complexity or vagueness of the

and they have no independent effect on state behavior.”); GEORG SCHWARZENBERGER, *POWER POLITICS* 199 (1964) (“In a society in which power is the overriding consideration, the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power, and to give this overriding system the respectability and sanctity law confers”).

<sup>181</sup> The major competing theory to realism is institutionalism or regime theory. Like realists, institutionalists agree that states are rational actors operating in a state of anarchy, but institutionalists believe that states can use institutions to create mutually beneficial arrangements in specific issue areas. See Robert O. Keohane, *Institutional Theory and the Realist Challenge After the Cold War*, in *Neorealism and Neoliberalism* 269, 271 (David A. Baldwin ed., 1993). According to Stephen Krasner, such regimes involve “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1983). The third alternative theory of international relations is known as liberal theory. See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *AM. J. INT’L L.* 205 (1993). For a discussion of the theoretical underpinnings of liberal theory, see *supra* notes \_\_\_ and accompanying text.

<sup>182</sup> John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, *HARV. INT’L L.J.* 139, 139 (1996).

<sup>183</sup> Unlike the foreign affairs realm, the political branches are not usually allowed to pursue pure political expedience in the domestic context by privileging one interest group over another. See Cass Sunstein, *Naked Preferences and the Constitution*, 84 *COL. L. REV.* 1689, 1690 (1984) (“The constitutional requirement that something other than a naked preference be shown to justify differential treatment provides a means, admittedly imperfect, of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover.”).

<sup>184</sup> See, e.g., Koh, *supra* note \_\_\_ at 221-22.

underlying foreign affairs issues, but because the very nature of these foreign affairs powers depend on considerations of “Realpolitik.” Moreover, the meaning of these terms also tends to vacillate with changes in the international environment. For instance, when confronted with the eighteenth century threat of piracy on international waters, the President and Congress implemented innovative devices to this situation at the time, including interventions against countries that harbored pirates.<sup>185</sup> In the current international security climate, however, the issue of piracy is no longer a concern. Today, the United States faces a new and different set of security challenges in the international realm, such as the threat of international terrorism,<sup>186</sup> and there is no need to assume that the Constitution would constrain the political branches from developing new methods for tackling these problems.<sup>187</sup> Of course, one might object to this analysis and argue that not all issues of international politics necessarily implicate national security concerns. The response is while this may be true, it is hardly the province of the courts to make that determination. In the end, the question of the difference between national security and other kinds of issues turns out not to be one that is easily amenable to legal categorization.<sup>188</sup>

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<sup>185</sup> Right to Protect Citizens in Foreign Countries by Landing Forces: Memorandum by the Solicitor for the Department of State 34 (3d rev. ed. 1934) (describing incidences in Cuba, Amelia Island, and China where American forces destroyed pirates). Indeed, the Constitution explicitly gives Congress the power “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. Const. art. I, § 8, cl. 10. Ruth Wedgwood has argued, however, that it was commonly understood in the eighteenth century that the President could punish acts of piracy without prior congressional approval. See Ruth Wedgwood, *supra* note \_\_ at 242.

<sup>186</sup> Some scholars have argued that terrorism is the modern equivalent of the eighteenth century problem of piracy. See Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337, 337 (2002); but cf George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POLY 635, 636 (2002) (“I see no appeal to this analogy except that the word ‘piracy’ is mentioned in the Constitution as a fit object of Congressional penal legislation. Pirates rob for loot; they seek lucre on the high seas, where no state can claim territorial jurisdiction. The presumed enemies of September 11 have plenty of cash; they act not for profit, but for the sake of glory and their conception of God.”).

<sup>187</sup> Some political actors have criticized the notion that eighteenth century norms should govern the foreign affairs powers of the political branches. See J. William Fulbright, *American Foreign Policy in the 20<sup>th</sup> Century Under and 18<sup>th</sup> Century Constitution*, 47 CORNELL L. Q. 1, 1 (1961) (“The question we face is whether our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the 18<sup>th</sup> century, is adequate for the formulation and conduct of foreign policy of a 20<sup>th</sup> century nation, pre-eminent in political and military powers and burdened with all the enormous responsibilities that accompany that power.”).

<sup>188</sup> For instance, Professor Bhala has demonstrated that many seemingly mundane international trade issues often implicate international security concerns. See Raj Bhala, *National Security and International Trade: What the GATT says, and What the United States Does*, 19 U. PA. J. INT’L ECON. L. 263 (1998); see also Wesley A. Cann, Jr., *Creating Standards of Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT’L L. 413, 415 (2001) (observing that in the context of the WTO “most industrialized nations have taken the position that ‘security interests’ are indeed self-defining. As a result, the decision regarding the validity of an action allegedly taken for security reasons is left solely to the discretion of the party taking that action.”).

Both the writings of the founding generation and the prevailing case law reinforce the notion that the political branches should have wide latitude in responding to the new challenges of the international arena without any judicially imposed limitations. In the *Federalist Papers*, Alexander Hamilton concluded that the scope of the foreign affairs powers should be construed flexibly enough to accommodate all possible situations that might pose a threat to national security:

These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.<sup>189</sup>

Reaffirming Hamilton's concerns, the Supreme Court has held on several occasions that it is the political branches, and not the courts, that should make determinations regarding the existence and nature of a national security threat.<sup>190</sup> Consistent with this approach, the Court has also determined that arrangements between the political branches regarding the allocation of authority in foreign affairs are not subject to the same constitutional limits on delegation that exist in the domestic sphere.<sup>191</sup>

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<sup>189</sup> The Federalist NO. 23, at 122 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also id.* at 156 (“[I]t is both unwise and dangerous to deny the federal government an unconfined authority in respect to all those objects which are intrusted to its management.”); FORREST McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 110 (1979) (“Hamilton believed the government would have powers inherent in sovereignty that were limited only by the ends for which it was created”).

<sup>190</sup> The Court's most pronounced statement of this principle occurs in *Stewart v. Khan*, 78 U.S. (11 Wall. 493 (1870)). There the Court held:

The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.

*Id.* at 506-07; *see also* *Dames & Moore v. Regan*, 654, 662 (observing that the executive branch “exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal”); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.”) (quotations omitted); *see also* *Smith v. Regan*, 844 F.2d 195, 1999 (4<sup>th</sup> Cir. 1988) (“The courts, unschooled in ‘the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict,’ must leave these sensitive determinations where the text of the Constitution . . . place[s] them-- with the political branches of our government.”) (quotations omitted).

<sup>191</sup> *Curtiss-Wright*, 299 U.S. at 304 (holding that in the area of foreign affairs, a relatively broad delegation of congressional powers is permissible); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (permitting a broad delegation of congressional powers on the basis that “Congress--in giving the Executive authority over

Finally, a related but equally significant concern is that the compared to the political branches, the courts lack the institutional capacity to evaluate the relevance of evidence when their understanding of the applicable norms governing such evidence is incomplete. This problem is distinct from the issue as to whether or not the courts have access to the kind of evidence that will enable them to make an informed decision on foreign affairs controversies. Courts and commentators often suggest that courts should not have access to such evidence because it involves sensitive and secret matters of national security.<sup>192</sup> But as one commentator has argued, one possible remedy to the latter problem would be to present such evidence in camera.<sup>193</sup> If we assume, however, that the courts are institutionally incapable of evaluating and understanding the norms of the international context in which the controversy arises, then increased access to evidence would not cure the problem. In such circumstances, the difficulty with judicial involvement stems not from the lack of evidence, but from the fact that the courts lack meaningful standards to evaluate such evidence. In *Chicago & Southern Air Lines*, Justice Jackson seemed to acknowledge this aspect of the judiciary's institutional incompetence on foreign affairs issues:

It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy.<sup>194</sup>

Upon analysis, Justice Jackson's opinion reveals that the Court was simply aware of its limitations as a decisional body to review matters where legally discernible criteria for evaluating the evidence were not available.

## 2. *The Judiciary's Lack of Authoritativeness in Foreign Affairs*

In many contexts, the courts are reluctant to involve themselves in foreign affairs controversies because of the perceived lack of institutional authoritativeness or legitimacy. The notion that the courts may invoke the doctrine in order to avoid a

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matters of foreign affairs-- must of necessity paint with a brush broader than that it customarily wields in domestic areas").

<sup>192</sup> See, e.g., *Snepp v. United States*, 444 U.S. 509 n. 3 (1980) ("[T]he Government has a compelling interest in protecting the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence"); *Curtiss-Wright*, 299 U.S. at 320 ("Secrecy in respect of information gathered by [the President] may be highly necessary, and the premature disclosure of it productive of harmful results.").

<sup>193</sup> See Koh, *supra* note \_\_ at 221-22.

<sup>194</sup> 333 U.S. at 111.

confrontation with the political branches is not entirely new. Indeed, one of the rationales that Professor Bickel put forth in support of the political question doctrine involved what he described as “the anxiety, not so much that the judicial judgment will be ignored, as that perhaps that it should but will not be . . .”<sup>195</sup> Not much of the commentary has focused, however, on the specific relationship between the substantive nature of foreign affairs and the institutional authoritativeness of the courts.

Commentators have largely rejected the “institutional legitimacy” rationale even while acknowledging its explanatory power in certain political question doctrine cases.<sup>196</sup> At bottom, most of these commentators argue that the mere fear of being ignored by the political branches cannot justify the abdication of the judicial function in “high stakes” or controversial cases. As explained by Professor Redish, “it is highly unlikely that the dangers of adherence to a decision would be so great as to justify the risk of political backlash that the government’s disregard of a Supreme Court decision would entail.”<sup>197</sup> If the courts’ reluctance to adjudicate on foreign affairs issues were cast as a mere opportunistic retreat from a clash with the political branches, then Professor Redish’s concerns would be justified. In the context of the judiciary’s limitations in a system of separated powers, however, those concerns seem misplaced.

To critics of the political question doctrine, such as Professor Redish, the question is not so much on whether the courts have the requisite institutional legitimacy to review foreign affairs matters, but whether they risk diminishing whatever institutional legitimacy they possess when they do so. Indeed, these commentators assume as given the judiciary’s institutional authoritativeness to rule on any legal matter that comes before it. That assumption, however, is wrong. Rather than presuppose the judiciary’s legitimacy to exercise a particular function, the proper analysis should focus on the source of the courts’ institutional legitimacy to engage in judicial review generally, and then ask whether such institutional legitimacy extends to foreign affairs cases. As demonstrated below, one significant misgiving that the courts may have about reviewing foreign affairs cases is that is that they simply lack the requisite institutional legitimacy to address such issues.

In the past two decades, the Supreme Court and commentators have examined in great detail the basis of the institutional legitimacy of courts. Social scientists like Tom Tyler and Gregory Mitchell have drawn upon extensive empirical evidence to demonstrate that courts, like other political institutions, “need[] a mandate entitling them to undertake the resolution of a controversial public policy issue.”<sup>198</sup> In the absence

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<sup>195</sup> BICKEL, *supra* note \_\_, at 184.

<sup>196</sup> See FRANCK, *supra* note \_\_ at 58-59 (criticizing lack of enforcement rationale); Redish, *supra* note \_\_ at 1053 (observing that this rationale “is generally rejected [by modern commentators], yet it may be the primary – if unstated – explanation of the classical judicial refusals to review”); Scharpf, *supra* note \_\_ at 549-55 (rejecting what he calls an “opportunistic theory” of the political question doctrine).

<sup>197</sup> See Redish, *supra* note \_\_ at 1053.

<sup>198</sup> Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703, 718 (1994); see also TOM

of such a mandate, these commentators conclude that the courts will lack the requisite authoritativeness that ensures public compliance with judicial decisions.<sup>199</sup> Similarly, Walter Murphy and Joseph Tanenhaus have argued that public consensus is integral to the judiciary's legitimacy: "In a political system ostensibly based on consent, the Court's legitimacy . . . must ultimately spring from public acceptance of . . . of its various roles."<sup>200</sup> In *Planned Parenthood of Pennsylvania v. Casey*,<sup>201</sup> a plurality of the Supreme Court explicitly endorsed this theory of its institutional legitimacy. "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and what it demands."<sup>202</sup>

In the domestic affairs context, the Court draws its legitimacy largely from its mandate to resolve issues related to protecting constitutional rights of individuals and underrepresented groups.<sup>203</sup> The *Casey* plurality concluded that the courts are able to sustain this legitimacy by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."<sup>204</sup> In addition to general public support of the courts, the political branches also have an incentive to acquiesce to the judiciary's institutional role of judicial review. Judicial review serves as a very important legitimating function for the activities of the political branches. As Professor Choper explains, this legitimating function "is critically important for national unity; that public knowledge that an independent tribunal has approved the political assumptions of authority adds dignity to the laws of the central government and inspires confidence that it is acting within its constitutional boundaries."<sup>205</sup> In any event, although the scope of such review may be subject to debate, the courts nonetheless enjoy a general presumption of legitimacy when they adjudicate on domestic constitutional questions. There is no reason to assume, however, that this presumption of legitimacy extends to foreign affairs cases.

In the context of foreign affairs, the political branches have very little need for the judiciary's legitimating function. More importantly, the courts seem to understand its

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R. TYLER, WHY PEOPLE OBEY THE LAW 19-39 (discussing the relationship between legitimacy and compliance).

<sup>199</sup> *Id.* at 717.

<sup>200</sup> Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 N.W. U. L. REV. 985, 992 (1990).

<sup>201</sup> 505 U.S. 833 (1992).

<sup>202</sup> *Id.* at 865.

<sup>203</sup> See Tyler & Macey, *supra* note \_\_ at 718.

<sup>204</sup> *Casey*, 505 U.S. at 866.

<sup>205</sup> Choper, *supra* note \_\_ at 230. However, it is the judiciary's aura of legitimacy that drives political branch compliance with judicial determinations in the domestic context. After all, "[t]he judiciary, on the contrary, has no influence over either sword or purse; no directive either of the strength of the wealth of the society . . . It may be said to have neither FORCE nor WILL but merely judgment ...." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

limited utility in constitutional foreign affairs disputes. One commentator has used the metaphor of a “faustian bargain” to describe this understanding between the courts and the political branches in foreign affairs.<sup>206</sup> In this bargain, the judiciary essentially ceded the power to review foreign affairs issues in return for an understanding that the political branches would consent to its authority to review domestic constitutional issues.<sup>207</sup> While the metaphor of a faustian bargain may seem like an overstatement, it nonetheless captures the underpinnings of the longstanding historical relationship between the political branches and the Supreme Court regarding the allocation of constitutional authority.<sup>208</sup> From an institutional perspective, the political branches do not seem to have much to gain by acquiescing to judicial oversight in foreign affairs. Unlike legal controversies in the domestic realm, the political branches do not seem to have any need for an impartial tribunal to dispense judgments regarding the scope of their foreign affairs activities. This observation is especially true when such activities take place in an international realm where nation states do not always abide by the norms of international law and where there is no centralized decision-making authority. In that realm, the political branches may decide to act of a legal obligation in certain contexts, but not in others. Understandably, in many disputes involving foreign affairs issues, the government has usually asked the courts to abstain from reviewing the issue rather than request a particular outcome on the merits.<sup>209</sup>

Furthermore, unlike in domestic constitutional controversies, it is also doubtful that the judiciary can draw on the popular underpinnings of its legitimacy should the political branches ignore its foreign affairs determinations. As one commentator has explained, the public appetite for judicial involvement in international issues is not particularly strong.<sup>210</sup> The judiciary’s lack of popular legitimacy in foreign affairs is particularly understandable when the relevant controversy touches on matters of national security. As demonstrated above, in matters involving the domestic operations of the government, the court plays a very important role in legitimizing the activities of the other branches, as well as providing a reliable mechanism for the resolution of disputes between private individuals. When matters touch on the very existence of the state, however, such as when the state faces an external threat, the justifications for judicial involvement correspondingly diminish.<sup>211</sup> Thus, far from getting popular support in the

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<sup>206</sup> Franck, *supra* note \_\_ at 10-12.

<sup>207</sup> *Id.*

<sup>208</sup> Some federal courts have conceded this important dichotomy between the nature of judicial review in the domestic context and in foreign affairs. See, e.g., *United States & Namibia Trade Council v. United States Dep’t of State*, 90 F.R.D. 695, 698 (D.D.C. 1981) (“Although there are some situations where judicial review is appropriate, these generally involve the interpretation of statutes, executive declarations, etc., rather than the making of the kind of substantive determinations embodied in executive or congressional action in the foreign affairs field.”).

<sup>209</sup> See, e.g., *People’s Mojahedin Organization of Iran v. U.S. Dept. of State*, 182 F.3d 17, 23 (D.C. Cir. 1999).

<sup>210</sup> Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2278-79 (1991).

<sup>211</sup> See Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 299, 331 (1925).

event of a confrontation with the political branches, it is more likely that the courts will face public criticism for intervening improperly in foreign affairs or jeopardizing national security.

Finally, there is another significant reason why the courts might believe that they are unable to enforce their decision against the political branches in foreign affairs cases. Simply put, given the breadth of the political branches' authority in foreign affairs, they often possess tools that would enable them to avoid judicial determinations adverse to their interests. A survey of some of some real and hypothetical cases involving disputes over the allocation of foreign affairs will help illustrate this point. For instance, in *Goldwater v. Carter*, the issue at stake was whether the President had to submit a formal termination of a treaty for Senate ratification.<sup>212</sup> In the end, the Court refused to require the President to do so, but could not garner a majority behind any single justification.<sup>213</sup> Assume, however, that the Court reached the contrary conclusion that the President could not terminate the treaty without the approval of a supermajority of the Senate. The problem with this hypothetical outcome is that the President could effectively avoid the Court's determination by refusing to enforce the treaty, or by independently making a decision to breach the treaty. It is widely understood that the President has the authority to breach treaty commitments with another country, if he so chooses.<sup>214</sup> But if this is the case, then it does not make much sense for the courts to try to adjudicate the question of whether the President alone can formally terminate such treaties.

In addition, similar constraints on the interpretive authority of the courts can also be demonstrated in the war powers context. Assume that pursuant to the "declare war" clause, a court rules that a President cannot engage in war without prior congressional approval. Presumably, such a court would concede, as even most pro-Congress scholars in the war-powers debate do, that the President still retains the residual authority to engage in a defensive war without congressional approval.<sup>215</sup> What happens then if the President launches an offensive war without congressional approval, but insists that it is really a defensive war? Should the courts have the authority to distinguish between defensive and offensive wars? If so, what criteria or standards should they employ? In the end, such a system would likely prove unworkable in practice. For instance, once the President starts a war, it is difficult, if not almost impossible, to make post-hoc determinations from a legal

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<sup>212</sup> 444 U.S. 996 (1979).

<sup>213</sup> *Id.* at 998.

<sup>214</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1, 30 (1831) ("There is then a great deal of sense in the [traditional] rule... that as between sovereigns, breaches of treaty were not breaches of contract cognizable in a court of justice...."); see also John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1725-29 (2000); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1986); cf. *Vienna Convention*, art. 60(1), reprinted at 8 I.L.M. 679 (1969) ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part").

<sup>215</sup> See Michael Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. at 1622 (observing that "[e]ssentially everyone in the war powers debate agrees that the President has some independent power to fight a defensive war without authorization from Congress").

point of view as to whether the war is properly an offensive or defensive war. Moreover, inviting the courts to make such a distinction would invariably draw the courts into making a determination as to whether another country poses a significant enough “offensive” threat to United States security to warrant a defensive reaction by the President. It seems obvious, however, that such a determination would be clearly beyond the institutional competence of the courts.

### 3. *The Costs of Judicial Intervention in Foreign Affairs Outweigh the Benefits*

In many circumstances, the political question doctrine can be justified by the fact that the costs of judicial intervention in foreign affairs are considerably high while the benefits, if any, are entirely speculative. At first glance, this rationale seems problematic because any attempt to calculate the costs of judicial intervention would very likely run up against methodological difficulties, especially since there seems to be no clear criteria for comparing judicial versus political branch performance in foreign affairs controversies. Nonetheless, there are certain institutional considerations that warrant a conclusion that judicial intervention in foreign affairs controversies is very likely to impose serious costs on the administration of foreign policy. One such consideration involves the fact that the courts are not capable of understanding or controlling the effects of their decisions on foreign countries, nor do they have any control over the reaction of foreign countries to their decisions. The second but related consideration is that the various remedial devices available to the courts, such as injunctions, writs, declaratory relief, and contempt orders, are particularly ill-suited to matters relating to foreign affairs.

#### a. *Assessing the Costs of Judicial Intervention*

The costs associated with judicial error are most evident in cases involving controversies over the allocation of war powers. First, the nature of such controversies often requires immediate attention, and it may prove costly for the political branches to await the outcome of a judicial determination. Second, to the extent that a determination will turn on whether the executive branch has produced sufficient enough evidence to warrant the commencement of military hostilities without congressional authorization, the consequences of judicial error can be extremely high, if not catastrophic. Imagine, for instance, that the Supreme Court sets forth a standard for war powers controversies that requires the President to demonstrate that a foreign country imposes an imminent threat to national security before he can commence military hostilities without congressional authorization. If the Court errs in its assessment of the severity of an external threat, however, its judgment could leave the country defenseless in the event of an attack. Such difficulties underscore an important difference between domestic controversies and foreign controversies. In a domestic controversy, the costs of judicial error are rarely ever that high and the courts often have ample opportunity to correct their previous interpretive errors.

This risk of judicial error is very much implicit in the decisions that treated the legality of the Vietnam War as a political question. For example, with respect to whether

the President's decision to mine the harbors of North Vietnam constituted an unauthorized escalation of war under the War Powers Act, the Second Circuit articulated the risk of that court's involvement in these terms:

Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan . . . Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President's view that the mining of North Vietnam's harbors was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know.<sup>216</sup>

Therefore, the court concluded that these kinds of questions should be appropriately addressed to the political branches.

One might object and argue that the circumstances described above would only apply when war or imminent threats to national security issues are at stake. While national security concerns best illustrate the dangers of judicial intervention, framing this factor exclusively in terms of war is not appropriate. First, as explained in Section A above, it is often difficult to separate national security issues from other soft diplomacy concerns.<sup>217</sup> Second, and more importantly, the costs of judicial intervention stems not so much from the fact that war may be a factor, but that the courts are incapable of predicting whether foreign nations may be affected by a judicial decision, or how such nations may react to such a decision. This latter consideration extends to issues affecting international trade and commerce, as well as international security. As explained by Justice Brennan in *Contained Corporation of America v. Franchise Tax Bd.*,<sup>218</sup> a case involving a tax dispute, "th[e] Court has little competence in determining precisely when foreign nations will be offended by particular acts."<sup>219</sup> Thus, in the absence of a more precise understanding of the foreign interests that may be adversely affected by a judicial determination, the courts have appropriately left the resolution of such foreign affairs disputes to the political branches.

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<sup>216</sup> *Da Costa v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973).

<sup>217</sup> See discussion in text accompanying notes \_\_

<sup>218</sup> 463 U.S. 159 (1983)

<sup>219</sup> *Id.* at 194; see also *In re Tobacco Litigation*, 100 F. Supp. 2d 31, 28 (D.D.C. 2000) ("[T]he federal courts have little context or expertise by which to analyze and address the potential implications of a lawsuit on foreign relations."); *Atlee v. Laird*, 347 F.Supp. 689, 702 (E.D.Pa.1972), *aff'd sub. nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973) ("[A] major element [of the political question doctrine] concerns the inherent inability of a court to predict the international consequences flowing from a decision on the merits.").

One objection to this explanation might be that concerns regarding the effects of litigation on unrelated parties often come up in the domestic context, but that courts do not necessarily defer to the political branches in such cases. For instance, some commentators have described the judicial role in the prison reform litigation that started in the late 1960s as involving complex and multifaceted consequences that extended beyond the traditional adjudicatory model.<sup>220</sup> The late Abram Chayes aptly characterized these proceedings as one “which ha[d] widespread effects on persons not before the court and require[d] the judge’s continuous involvement in administration and implementation.”<sup>221</sup> These domestic affairs controversies are significantly different from those affecting foreign affairs, however, because the non-party entities affected by judicial decisions in the domestic context operate largely within the same legal framework as the courts. On the other hand, in the foreign affairs context, the affected entities lie outside the jurisdiction of the domestic courts. More importantly, unlike in the domestic context, considerations of power often weigh as heavily as legal factors in determining the norms of inter-state behavior.<sup>222</sup> Therefore, there is greater risk that a court’s determination in a foreign affairs dispute could have an impact on a wider range of actors outside the court’s jurisdiction than it would in a domestic dispute.

The significance of power in international relations also underscores the other related reason why the involvement of courts in foreign affairs might be detrimental to foreign policy. This rationale involves the inherent limitations of the various remedial tools available to the courts when they confront foreign affairs controversies. For instance, in many international disputes or controversies, an approach that focuses on power-based diplomacy and negotiation may be more advantageous to the states involved than rule-based adjudications.<sup>223</sup> Even one of the leading proponents of a rule-based approach in international affairs admits that “in practice the observable international institutions and legal systems involve some mixture of both [rule-based and power-based diplomatic approaches].”<sup>224</sup> Given the continuous relevance of power as a factor in

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<sup>220</sup> See generally MALCOLM FEELY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISON (1988).

<sup>221</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L. Rev. 1281, 1284 (1976). Certain commentators have criticized this judicial policy making role of the courts as a judicial usurpation of a legislative function. See John H. Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1165 (1996).

<sup>222</sup> See Section A of Part III and discussion *supra*.

<sup>223</sup> Madeline Morris, *High Crimes and Misconceptions* 64 LAW & CONTEMP. PROBS. 13, 18 (2001) (listing some of the advantages of diplomacy over rule-based adjudication).

<sup>224</sup> JOHN H. JACKSON, THE WORLD TRADING SYSTEM 85 (1989). John Jackson recognized the role that power-based diplomacy in the original GATT system, but has argued that the trade system has now shifted more towards a rule-based approach. See John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1571 (1984); see also G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 833 (1995) (observing that new WTO represents a victory of rule-based adjudication over power-based diplomacy); but see Frank Garcia, *Evaluating International Economic Law Dispute Mechanisms* 42 S. TEX. L. REV. 1215, 1218 (2001) (observing that many state parties in the WTO may not be ready for a rule-based system even at the appellate level).

international relations, the remedial devices available to the courts, such as injunctions, writs, and declaratory relief, are simply inadequate for addressing foreign affairs controversies. This is because judicial remedies are often designed to address the concerns of conventional adjudication, which as Professor Fuller has explained, almost always involve “claims of right or accusation of faults.”<sup>225</sup> In the international system, however, issues cannot be broken down neatly into legally cognizable wrong or right answers. Thus, in such circumstances, the affected actors may prefer a more flexible and open-ended resolution of a problem than would be achieved through a decision based on rules and standards. Understandably, courts have occasionally invoked this non-rule based aspect of international diplomacy to justify abstaining from foreign affairs controversies.<sup>226</sup>

b. *Assessing the Purported Benefits of Judicial Intervention*

The benefits of judicial intervention in foreign affairs are illusory. Two assumptions underlie the belief that judicial intervention in foreign affairs controversies will yield benefits. The first is that the courts will be able to check and control the “executive usurpation” of congressional authority in foreign affairs better than Congress has been able to do on its own. The second, which is substantially related to the first, is that the absence of judicial review necessarily implies the absence of the rule of law in foreign affairs matters.<sup>227</sup> This section will argue that both of these assumptions are unfounded.

The fundamental problem with the first assumption is that it ignores some basic attributes of executive-congressional relations in foreign affairs. In the context of a dispute over the allocation of authority in foreign affairs, Congress has at its disposal a variety of structural safeguards, such as the spending power, with which it could protect its foreign affairs prerogative against executive usurpation. Admittedly, such structural safeguards might also exist in the domestic sphere and the courts do not necessarily defer to political branch determinations regarding separation of powers disputes in that realm.<sup>228</sup> But as Justice Kennedy observed in his concurrence in *United States v. Lopez*,<sup>229</sup> it is not clear that Congress has either the incentives or the proper framework to deploy the

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<sup>225</sup> Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARVARD L. REV. 353, 385 (1978).

<sup>226</sup> See, e.g., *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (observing that there is branch of the political question doctrine “which is based on the extreme sensitivity of the conduct of foreign affairs, judicial ignorance of those affairs, and the long tradition of regarding their conduct as an executive prerogative because it depends on speed, secrecy, freedom from the constraint of rules”); *Aktepe v. USA*, 105 F.3d 1400, 1403 (11th Cir. 1997) (“As courts are unschooled in ‘the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict,’ the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government.”).

<sup>227</sup> See, e.g., Koh, *supra* note \_\_\_ at 224 (“When the courts systematically remove themselves from independent review of executive action, it is only a matter of time before clear lines of legality fade from the landscape of American foreign affairs.”).

<sup>228</sup> See *supra* text accompanying notes \_\_\_\_

<sup>229</sup> 514 U.S. 549 (1995).

structural safeguards when the prime beneficiaries of the domestic constitutional constraint are third parties, such as the states.<sup>230</sup> In the foreign affairs context, the prime beneficiaries in allocation of powers disputes are not third parties, but the political branches themselves. Moreover, as discussed in the previous two sections of this Article, foreign affairs controversies present other unique challenges to judicial resolution; therefore, the courts have more reason to defer to any accommodation the political branches might reach when they compete for foreign affairs authority.

One place where the benefits of judicial intervention are clearly questionable is in those cases dealing with the constitutional allocation of war powers. Take, for instance, the argument by opponents of the question doctrine that Congress's power of the purse is not sufficient to protect its war powers prerogative. These critics argue that this safeguard is rarely effective because an appropriations cutoff in the middle of a war would "expose[] legislators to charges of having stranded soldiers in the field."<sup>231</sup> Assume, for a moment, that this observation is true. How does judicial intervention in the underlying dispute change anything? Is a judicial order that enjoins the President from prosecuting a war in mid-course any less susceptible to political criticism than a congressional decision to cut off spending? The only difference is that where the public outcry may be targeted at the legislature in one instance, it would be leveled against the courts in the other. Given this dimension of the problem, it is not surprising that members of congress occasionally seek the intervention of the courts in such controversies,<sup>232</sup> even when it seems that Congress has the tools to sufficiently protect its interest on its own. Nonetheless, the courts, possibly perceptive of Congress's deflection strategy, have refused to take the bait.

Even some of the most outspoken opponents of the political question doctrine, such as Professor Franck, have recognized the "political risks" posed by judicial intervention in war powers disputes.<sup>233</sup> Paraphrasing Bickel, Franck characterizes the problem with issuing injunctive relief as involving "the prospect that such raises the specter not only that such an order will not be obeyed but, perhaps an even darker prospect, that it might be, with potentially disastrous consequences for American military personnel . . . , as well as the court's legitimacy."<sup>234</sup> Franck suggests as an alternative that the courts issue declaratory judgments rather than injunctions in cases where a war may already be in progress.<sup>235</sup> The problem with Franck's intermediate solution is that it does

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<sup>230</sup> *Id.* at 578 (Kennedy, J., concurring) (referring to the fact that Congress does not have structural incentives to consider interests of states when it passes legislation).

<sup>231</sup> See Koh, *supra* note \_\_ at 133.

<sup>232</sup> See Abner J. Mikva, *The Political Question Revisited: War Powers and the "Zone of Twilight,"* 76 Ky. L. J. 329, 355 (1987) (observing that "[t]he disputes over the Vietnam War left a second important legacy in the war powers era: the lawsuit, often filed with at least one Congressman as a plaintiff, asking the courts to intervene in limiting a President's use of the war power.")

<sup>233</sup> See FRANCK, *supra* note \_\_ at 153; Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AMER. J. INT'L L. 605, 640 (1977) ("The courts should . . . not be put in a position of actually stopping war, a politically loaded task.").

<sup>234</sup> FRANCK, *supra* note \_\_ at 153.

<sup>235</sup> FRANCK, *supra* note \_\_ at 153-54.

little to address the problems of institutional legitimacy and compliance that he links with injunctive relief. Indeed, one might expect greater instances of non-compliance with judicial determinations where the proposed judicial remedy is half-hearted and the consequences for violation are relatively insignificant.

Similarly, the argument that equates the absence of judicial review with the absence of the rule of law in foreign affairs remains also seems to be incorrect. As argued previously, there is a rich and longstanding tradition of constitutional interpretation by the political branches that discredits the judicial exclusivity theory that underlies this argument.<sup>236</sup> Moreover, there is also substantial evidence that demonstrates that this view of political branch lawlessness is inconsistent with the realities of political branch interaction in foreign affairs.

Far from ignoring constitutional considerations, the political branches have done particularly well in defining each branch's constitutional authority in the administration of foreign affairs. Interestingly, however, the resultant bargain or division of authority does not mirror the outcome conventional interpretive theories would predict. For instance, how Congress exercises its authority over war related matters seems not to be fixed, but seems to ebb and flow depending on the relative institutional strength and bargaining position of each branch. As an example, in the aftermath of the President's failure to succeed in the Vietnam conflict, Congress was emboldened to pass a series of laws restricting presidential discretion in war related matters.<sup>237</sup> Such historically contingent swings in authority do not imply, however, that the President and the Congress have been indifferent to textual language in discerning their respective constitutional powers under the various foreign affairs provisions. On the contrary, flagrant attempts by either branch to intrude into the other's clearly demarcated constitutional powers are largely uncommon. As Professor Henkin has observed, despite broad and sweeping claims of executive power in foreign affairs issues, no President has ever asserted the authority to regulate commerce with foreign nations, lay and collect taxes, duties, or imports and excises, or pass domestic criminal laws.<sup>238</sup> Significantly, the President and Congress have maintained these constitutional boundaries in foreign affairs without hardly any guidance or oversight by the courts.

On the other hand, the political branches routinely struggle with each other over the allocation of foreign affairs authority where the constitutionally assigned roles of both branches overlap, or where the scope of the constitutionally assigned roles are ambiguous. This spectrum where both branches compete for authority is often referred to as the "twilight zone" of foreign affairs powers.<sup>239</sup> The issues that fit within this spectrum include

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<sup>236</sup> See *supra* text accompanying notes \_\_\_

<sup>237</sup> See Franck, *After the Fall*, *supra* note \_\_\_ at 605-06.

<sup>238</sup> See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 89-90 (1996).

<sup>239</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (describing "a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.") (Jackson, J., concurring).

those controversies regarding the executive branch's powers to commence international hostilities without congressional authorization, or the executive branch's authority to enter international agreements without the consent of a supermajority of the Senate. Understandably, reasonable minds continue to disagree over the scope of political branch authority on these matters and the prospect of any definitive resolution of these in the foreseeable future is unlikely.<sup>240</sup> Because the Constitution does not prescribe any specific result in these cases, however, it is not far-fetched to assume that any accommodation that the political branches might reach regarding the sharing of these foreign affairs powers would be consistent with what the Constitution demands.

Admittedly, it is true that a judicial determination resolving the scope of these foreign affairs powers might provide a more precise demarcation of constitutional authority than does currently exist. Nonetheless, it is not clear that such a bright line rule would permit the flexibility and latitude necessary for the political branches to respond to the exigencies of the international system. Moreover, such a judicially imposed resolution would very likely upset any political equilibrium that the legislative and executive branches might achieve through the competition for foreign affairs authority. As Professor Wedgwood has explained, in the absence of such competition, "[a]n unbounded sense of constitutional entitlement may tempt a beneficiary to act immodestly, without the chastened sense that acceptance will turn upon good judgment as well as procedure."<sup>241</sup>

In sum, given the constitutional ambiguity in the roles of the political branches on certain foreign affairs issues, and the presence of significant structural safeguards to protect each political branch's interest, the benefits of judicial intervention in foreign affairs issues are likely to be relatively low, if not non-existent. Although judicial intervention might provide some modicum of finality and definitiveness to unsettled foreign affairs controversies, it is not clear that this outcome would be preferable to the status quo. In any event, any such benefits from judicial intervention would very likely be outweighed by the costs.

#### B. *Demarcating the Scope of Judicial Abstention in Foreign Affairs*

This section employs the balance of institutional competencies approach to understand the interaction between judicial deference and abstention in foreign affairs cases. More specifically, this section argues that these two doctrinal offshoots are interrelated in a way that reflects differences in degree and not of kind. Once this relationship is recognized, the contours of judicial abstention and deference in foreign affairs become much more coherent. The section concludes by exploring certain examples where the approach would help resolve the incoherence in the current judicial approach to foreign affairs controversies.

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<sup>240</sup> See supra text accompanying notes \_\_

<sup>241</sup> See Ruth Wedgwood, *The Uncertain Career of Executive Power*, 25 YALE J. INT'L L. 310, 314 (2000).

1. *The Relationship between Judicial Abstention and Deference*

In foreign relations, the doctrines of judicial abstention and deference are often addressed under separate rubrics. For instance, in abstaining from foreign affairs, courts usually invoke the laundry list of factors from the Supreme Court's decision in *Baker v. Carr*, but hardly ever mention these factors in the deference context. Moreover, certain commentators sometimes treat abstention and deference as almost being in irreconcilable tension with one another, since abstention connotes no judicial involvement in the dispute, whereas deference suggests that the court will at least reach the merits of the dispute.<sup>242</sup> There are some exceptions to this view. For instance, at least one commentator has argued that much of the judicial role in foreign affairs can be viewed through the prism of the Chevron deference in administrative law.<sup>243</sup> Not much academic commentary has focused, however, on the explicit interaction between abstention and deference when courts adjudicate on constitutional foreign affairs controversies.

The balance of institutional competencies model suggests that in the context of constitutional foreign affairs controversies, the doctrines of abstention and deference simply reflect differences in degree, rather than differences in kind. This approach does not in any way suggest a radical departure from current doctrine. In many ways, a disjointed patchwork of Supreme Court cases already acknowledges this relationship between abstention and deference, albeit in a jumbled and disjointed manner. For instance, in *Regan v. Wald*, the Court explained the need for judicial deference to the President's decision to restrict travel to Cuba on the grounds that foreign affairs matters "are largely immune from judicial inquiry or interference,"<sup>244</sup> which is the same rationale that courts often use to justify abstention on foreign affairs issues under the political question doctrine.

Some of the Court's exclusion and deportation cases also suggest a more explicit linkage between judicial abstention and deference in foreign affairs. The Court has observed, for instance, that the power to deport and exclude aliens involves matters of foreign affairs that are largely exempt from judicial inquiry.<sup>245</sup> Although the Court recognized that the political question doctrine did not necessarily apply because these cases involved individual rights claims, it nonetheless applied the doctrine's prudential factors in concluding that it was up to the political branches, and not the courts, to decide whether the relevant deportations or exclusions were reasonably related to national security interests.<sup>246</sup>

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<sup>242</sup> See, e.g., FRANCK, *supra* note \_\_ at 126-36 (suggesting that judicial deference and abstinence involve two different doctrinal approaches and recommending that courts abandon abstinence in favor of deference).

<sup>243</sup> See Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

<sup>244</sup> 468 U.S. 222, 242 (1984) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

<sup>245</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 589-90 (1952); *Galvan v. Press*, 347 U.S. 522, 532-33 (1954).

<sup>246</sup> *Shaughnessy* 342 U.S. at 590; *Galvan*, 347 U.S. at 532.

Viewing the doctrines of deference and abstention through the prism of the balance of institutional competencies model has distinct advantages. Most importantly, it helps to distinguish those foreign affairs controversies that merit judicial abstention, as opposed to those that merit judicial deference. In controversies regarding the constitutional allocation of foreign affairs powers disputes, for instance, the level of deference the courts accord the political branches should be absolute because, as demonstrated in the previous section, the underlying foreign affairs powers are not clearly amenable to judicial definition. Moreover, when the judicial branch faces allocation of foreign affairs powers disputes, it operates at the intersection of two areas where its institutional strengths are at its lowest ebb: foreign affairs and the separation of powers.<sup>247</sup>

On the other hand, absolute deference would be inappropriate for issues within the judicial branch's traditional bailiwick, such as individual rights or the construction of statutory and treaty provisions. Nevertheless, even in claims where individual rights are pitted against foreign policy issues, the model suggests that the courts should still accord the political branches substantial deference. Such deference strikes a fine balance between the relative institutional incompetence of the courts in foreign affairs matters and their institutional superiority over the political branches in resolving individual rights claims.

## 2. *Some Implications of the Approach in Contemporary Foreign Affairs Disputes*

Much of the current judicial approach in foreign affairs is already leaning towards a balance of institutional competencies approach.<sup>248</sup> Nonetheless, the Supreme Court's failure to articulate such an approach explicitly means that the contours of judicial abstention in foreign affairs remain incoherent. To resolve the current confusion in how the political question doctrine is applied in foreign affairs, the Court should take the extra step of generalizing this approach to all constitutional foreign affairs questions.

Below are two illustrations where the model would contribute towards eliminating confusion in the current judicial approach to foreign affairs controversies: (1) the resolution of individual rights claims that directly challenge foreign policy decisions; (2) where Congress has legislated on constitutional foreign affairs issues that courts normally abstain from under the political question doctrine. The first example also examines the application of the model to the President's ongoing efforts to combat international terrorism in the wake of the events of September 11, 2001.

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<sup>247</sup> See *CHOPER*, *supra* note \_\_ at 378-79 (observing that the judicial branch should not exert its institutional resources in resolving separation of power disputes "since, as a functional matter, the political branches are fully capable on protecting their own vital constitutional interests.").

<sup>248</sup> See, *eg.*, *Japan Whaling Assn.*, 478 U.S. at 230 (observing that the courts are ill-equipped to address certain foreign policy issues that are non-legal in nature); *Miami Nations of Indians*, 155 F.3d at 347 (observing that extensive sensitivity of foreign policy issues renders them inappropriate for judicial resolution; *cf* *Planned Parenthood Fed.*, 838 F.2d at 655-56 (observing that while courts should avoid adjudicating on the reasonableness of policy choices, they have the power to adjudicate on claims of violations of individual rights under the Constitution).

a. *Foreign Policy versus Individual Rights*

Although forays by the courts into foreign affairs are infrequent, the courts have not hesitated to adjudicate on the merits of claims with foreign affairs implications when individual rights or domestic property interests are at stake.<sup>249</sup> But even when the courts reach the merits of such claims, they nonetheless accord the political branches a significant amount of deference. The courts' deference in such controversies is most pronounced in those cases where the President and Congress act in concert. In his famous concurring opinion in the Steel Seizure case, Justice Jackson concluded that in such circumstances the President "personif[ies] the federal sovereignty" and "[h]is actions would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."<sup>250</sup> Adopting this framework, the courts have essentially blessed joint decisions by the political branches that intrude on individual rights without much analysis as to whether the government had even demonstrated a compelling justification for such actions.<sup>251</sup>

In many respects, the high degree of deference that the courts grant the political branches in such disputes accords with what a balance of institutional competencies model would predict, especially in those circumstances where the political branches are acting in coordination. For instance, although Justice Jackson's famous tripartite framework speaks mainly to executive authority, the flipside of that framework also suggests a discernible spectrum of judicial authority in constitutional foreign affairs controversies. At the peak of such judicial competence, where the President acts in opposition to the will of Congress in a controversy that pits individual rights against foreign affairs, the judicial branch would apply the same level of scrutiny as it does in

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<sup>249</sup>See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 464 (4<sup>th</sup> Cir. 2003) ("Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited. The Bill of Rights which Hamdi invokes in his petition is as much an instrument of mutual respect and tolerance as the Fourteenth Amendment is . . . To deprive any American citizen of its protections is not a step that any court would casually take."); *Planned Parenthood Fed.*, 838 F.2d at 655-56 (finding justiciable claims involving violations of first amendment rights even though claims would implicate foreign policy decisions of the executive branch).

<sup>250</sup>*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

<sup>251</sup>See e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (holding that statutory provision criminalizing belonging to a group that teaches and advocates the overthrow of the United States government did not violate the fifth and first amendment); *Communist Party v. Subversive Activities Control Board*, 361 U.S. 1 (1961) (holding that the registration requirements of the Subversive Activities Control Act were not unconstitutional as a bill of attainder or as repugnant to the First Amendment); *American Communication Ass'n v. Douds*, 339 U.S. 382 (1950) (holding that provision of the Labor Management Relations Act that conditioned recognition of a labor organization on filing of affidavits by its officers that they do not belong to the Communist Party and do not believe in overthrow of the government by force, did not violate first amendment); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (holding that the deportation of a legally resident alien because of his membership in the Communist Party did not violate the first or fifth amendment); *Galvan v. Press*, 347 U.S. 522 (1954) (holding that the deportation of a legally resident alien did not violate the constitution).

routine domestic constitutional disputes. At the middle range, where Congress and the President are acting in concert, the judicial branch would accord the political branches' determination a significant amount of deference. At its lowest ebb, such as when the constitutional controversy only involves a dispute over the allocation of foreign affairs authority, the judicial branch would abstain completely from the dispute.<sup>252</sup>

In any event, the notion that the choice between judicial abstinence or judicial deference should turn on the comparative institutional competence of the courts illuminates many settings where the judicial branch faces dilemmas regarding its role in foreign affairs disputes.

One prime example where this approach would be helpful in resolving current doctrinal incoherence involves those cases where an individual rights claim directly challenges a particular foreign policy decision. For instance, the courts have ruled that they will not review individual rights claims that challenge the wisdom of a foreign policy, as opposed to its implementation. Many of the cases confronting this issue have demonstrated, however, that this wisdom versus implementation dichotomy is untenable.

Consider *Dickson v. Ford*,<sup>253</sup> in which the Fifth Circuit refused to entertain an Establishment Clause challenging a statute that authorized military assistance to Israel. In invoking the political question doctrine, the court held that the challenge to the statute constituted "a challenge to the power of the President and Congress to conduct the foreign affairs of the United States."<sup>254</sup> In other words, to adjudicate on the merits of the claim, the court held that it would have to examine issues clearly beyond the competence of the judiciary, such as the wisdom of maintaining a balance of forces in the Middle East and Israel's self defense capacity.<sup>255</sup> By declining to review the claims in *Dickson*, the Fifth Circuit suggested that styling a claim as an individual rights violation would not remedy the institutional incapacity that the courts face when they handle foreign policy issues.

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<sup>252</sup> The Court's decision in the Iranian hostage case also supports this view. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). At first blush, both *Dames & Moore* and *Youngstown* appear to be pure separation of powers disputes, but on further examination, the core legal issues involved domestic property rights concerns. Both cases ostensibly involved challenges to the President's authority to seize or compromise domestic property interests for national security reasons. In *Youngstown*, the issue was the President's authority to seize the mills, and in *Dames & Moore*, his authority to suspend claims against the Iranian government pending in American courts. Although the Court did not expressly resolve the issue as to whether the settlement of the claims constituted a takings in *Dames & Moore*, it conceded that a takings claim could be available once the claims tribunal had completed its adjudications. 453 U.S. at 689. In his concurring opinion, Justice Powell made it clear that he believed that the core issue in the case involved a takings claim. *Id.* at 691 (Powell, J., concurring) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."). For academic commentary endorsing this view see Joel Stephan Telpner, *Dames & Moore v. Regan: Rethinking the Fifth Amendment Implications of the Iranian Hostage Agreement*, 68 IOWA L. REV 123 (1982).

<sup>253</sup> 521 F.2d 234 (5th Cir.1975).

<sup>254</sup> *Id.* at 235.

<sup>255</sup> *See id.*

By contrast, various courts have entertained suits where the courts concluded that the challenge was not directed at the wisdom of the underlying foreign affairs policy, but at how such a policy was implemented. For example, in *Planned Parenthood Federation of America, Inc. v. Agency for International Development*,<sup>256</sup> the Second Circuit held as justiciable an Establishment Clause challenge to the Agency for International Development's ("AID") implementation of a program that required the United States to withhold funding from foreign non-governmental organizations that funded abortions. In that case, the Second Circuit acknowledged that while courts are generally incompetent to review the policy choices made by the political branches, "it is a court's duty to determine whether the political branches in exercising their powers, have 'chosen a constitutionally permissible means of implementing that power.'"<sup>257</sup> Because the court concluded that the particular method that AID had chosen to implement its policy mandate was different from the underlying foreign policy itself, the Second Circuit ruled that the challenge to the constitutionality of that method did not implicate the political question doctrine.<sup>258</sup> Employing a similar distinction between policy and implementation, courts have held as justiciable challenges to AID's method of administering funds to foreign religious schools,<sup>259</sup> as well as to whether the United States military could run exercises on an American citizen's property in Honduras where such property had not been lawfully appropriated.<sup>260</sup>

Categorizing the issue of judicial abstention in these disputes into a policy versus implementation template does not make much sense. Indeed, in many circumstances, the implementation versus policy framework would prove to be a false dichotomy. In the case of the AID program that was litigated in *Planned Parenthood*, for instance, one might argue that any challenge to the implementation of the policy would necessarily also be a challenge to the underlying wisdom of the policy.<sup>261</sup> Moreover, casting a political branch decision as involving policy wisdom rather than policy implementation may not necessarily diminish the gravity of the alleged constitutional injury. Assume, for instance, that Congress passes a statute banning foreign aid to all non-Christian nations. Would it really matter what method the agency responsible for administering the statute chose to implement its mandate? Depending on the nature of the alleged constitutional injury in a particular dispute, it may be largely irrelevant. Finally, if as suggested in *Dickson*, the

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<sup>256</sup> 838 F.2d 649 (2d Cir. 1988).

<sup>257</sup> *Id.* at 656 (citations omitted).

<sup>258</sup> *See id.*

<sup>259</sup> *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991).

<sup>260</sup> *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1511-15 (D.C. Cir. 1984) (en banc).

<sup>261</sup> Indeed, the difficulty in the policy implementation versus policy wisdom divide is illustrated by the fact that the trial court in *Planned Parenthood* considered the plaintiffs claims to be a challenge to the wisdom of the policy, *see Planned Parenthood v. AID*, 670 F.Supp. 538, 545-46 (S.D.N.Y 1987), whereas the appeals court ruled that the plaintiffs were challenging the implementation of the policy. *Planned Parenthood*, 838 F.2d at 655. Significantly, the district observed that although the plaintiffs' claims were styled as challenged to the implementation of the policy, their real objection was to the wisdom of the underlying policy. 670 F. Supp. at 546.

objection to judicial intervention in adjudicating the wisdom of foreign policy decisions involves the lack of the judicial competence,<sup>262</sup> it is not clear how the courts are any more institutionally competent to adjudicate disputes concerning the implementation of such decisions.

Under the balance of institutional competencies model, 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. In such cases, the courts would not adjudicate on the underlying wisdom of the foreign policy, but would simply balance the foreign policy (either its wisdom or implementation) against the individual rights at stake. The courts could then accommodate the political branches’ comparative institutional competence over foreign affairs issues by according the judgment of the political branches a significant amount of deference.

Since the terrorist attacks of September 11, the courts have also been confronted with a series of cases that set individual rights claims against national security concerns.<sup>263</sup> Interestingly, the courts have implicitly embraced a balance of institutional competencies approach in reviewing those post-September 11 cases challenging the executive branch’s authority to detain United States citizens suspected of terrorist activities without providing them access to counsel.<sup>264</sup> The government has argued that the courts should abstain from hearing these cases because they involve sensitive matters of national security and foreign policy. The courts that have considered this argument have rejected it, but have nonetheless concluded that considerable deference to the political branches judgment was appropriate.<sup>265</sup> Although these courts did not explicitly address the relationship between judicial deference and abstention, at least one of the decisions seemed to assume that the scope of deference was directly linked to whether individual rights were implicated.<sup>266</sup> All these cases may be understood to hold that the courts have an obligation to adjudicate on foreign affairs issues that involve individual rights claims,

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<sup>262</sup> See *Dickson*, 521 F.2d 237.

<sup>263</sup> See, e.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (holding that privilege of litigation did not extend to aliens in military custody outside of United States territory).

<sup>264</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4<sup>th</sup> Cir. 2003) (*Hamdi II*); *Hamdi v. Rumsfeld*, 296 F.2d 278 (4<sup>th</sup> Cir. 2002) (*Hamdi I*); *Padilla ex rel. Newman v. Bush*, 233 F.Supp. 2d 564 (S.D.N.Y. 2002).

<sup>265</sup> See *Hamdi II*, 316 F.3d at 463-64 (recognizing that the courts owe great deference to the decisions of the political branches in foreign affairs, but rejecting the government’s argument that judicial abstention was appropriate); *Hamdi I*, 296 F.2d at 283 (holding that while “dismissal is . . . not appropriate, deference to the political branches certainly is”); *Padilla*, 233 F.Supp. 2d at 605-06 (“[The plaintiff] does not seem to dispute that courts owe considerable deference, as a general matter, to the acts and orders of the political branches--the President and Congress--in matters relating to foreign policy, national security, or military affairs. Nor could he...”)

<sup>266</sup> See *Hamdi II*, 316 F.3d at 464 (“Despite the clear allocation of war powers to the political branches, judicial deference made in the name of war is not unlimited . . . The duty of the judicial branch to protect out individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict.”)

but with the appropriate deference to the political branches, especially when the political branches are acting in coordination.<sup>267</sup>

*b. Judicial Construction of Statutes that Implicate Foreign Policy*

Finally, one last area where the courts have also declined to apply the political question doctrine is where the resolution of the foreign policy dispute turns on the interpretation of a statute, treaty, or administrative procedure.<sup>268</sup> The balance of institutional competencies model suggests that courts should review these controversies, not necessarily because they have special expertise in the substantive foreign policy issues involved, but because the political branches have acknowledged and accepted the risk of the courts' institutional incompetence in enacting the specific statutory or treaty provision. Judicial construction of such statutes presents a challenge, however, especially where Congress legislates in an area previously held non-justiciable under the political question doctrine.

A prime illustration of this difficulty involves the cases challenging the legality of executive branch's war-making activities under the War Powers Resolution.<sup>269</sup> Congress enacted this Resolution over Presidents Nixon's veto in 1973 in order to impose statutory limits on the President's war-making powers.<sup>270</sup> In a flurry of cases since the Resolution was passed, however, the courts have invoked the political question doctrine in refusing to resolve disputes arising under the Resolution.<sup>271</sup>

Were the courts correct in applying the political question disputes to these controversies? The answer turns on whether a court decides that in resolving the statutory claims, it would also have to resolve the constitutionality of the Resolution. On one view, the courts should approach the Resolution as they would any other legislation and adjudicate the issue on the merits. In other words, nothing under the model would

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<sup>267</sup> See, e.g., *Padilla* ("In the decision to detain Padilla as an unlawful combatant, for the reasons set forth above, the President is operating at maximum authority, under both the Constitution and the Joint Resolution.").

<sup>268</sup> See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (holding that "the challenge to the [government's] decision not to certify Japan for harvesting whales in excess of [International Whaling Commission] quotas presents a purely legal question of statutory interpretation" and thus the political question doctrine did not apply); *Flynn v. Schultz*, 748 F.2d 1186, 1191 (8th Cir. 1984) ("As a general rule, requests for relief involving foreign affairs which are not based on a constitutional right, treaty, congressional directive or established administrative procedure fall squarely on the category of political questions outlined in *Baker* which involve 'potential judicial interference with executive discretion in the foreign affairs field' and which seek to 'dictate foreign policy'" (quotations omitted)).

<sup>269</sup> 50 U.S.C. §§ 1541-1548 (1973).

<sup>270</sup> See *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987) ("The War Powers Resolution . . . sets forth procedures intended to guarantee Congress, in the absence of a declaration of war, an active role in all decisions concerning the deployment of United States Armed Forces abroad").

<sup>271</sup> See *Ange v. Bush*, 752 F. Supp. 509, 512 (D.D.C. 1990); *Lowry v. Reagan*, 676 F. Supp. at 339; *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 599 (D.D.C. 1983); *Crockett v. Reagan*, 538 F. Supp. 893 (D.D.C. 1982) *aff'd*, 720 F.3d 1355 (D.C. Cir. 1982).

prevent a judicial resolution of the issue since it simply involves a question as to whether the executive branch's action was legal under the relevant statute. And while there may still be very strong prudential reasons for the courts to avoid interjecting themselves into this kind of dispute, they can avail themselves of other judicial avoidance techniques that are less drastic than the political question doctrine. Take *Campbell v. Clinton*, for instance, a case where certain members of Congress argued that a presidential order directing airstrikes against Yugoslavia conflicted with the War Powers Resolution.<sup>272</sup> Rather than abstaining under the political question doctrine, the federal appeals court concluded that claimants lacked standing to bring a claim under the Resolution because their votes were not nullified by the President's action.<sup>273</sup> Citing the Supreme Court's decision in *Raines v. Byrd*,<sup>274</sup> the court held that the congressmen could not be injured where alternative legislative remedies were still available.<sup>275</sup>

The judicial avoidance device chosen by the *Campbell* court is hardly unusual. In the pre-*Raines* era, for instance, courts could invoke the doctrine of remedial discretion to abstain from cases brought by legislators challenging the propriety of executive branch action.<sup>276</sup> Like the doctrine of legislative standing under *Raines*, remedial discretion was a device for avoiding judicial involvement in political branch disputes in the absence of a constitutional "impasse" by the political branches.<sup>277</sup> As the trial court's decision in *Campbell* observed, after *Raines v. Byrd*, legislative standing replaced the court's previous remedial discretion jurisprudence.<sup>278</sup>

On a more expansive view of the political question doctrine, however, one could argue that a judicial intervention in a controversy under the Resolution might require the court to determine first whether the Resolution is constitutional, and that determination might implicate the political question doctrine. This position appears to be the one taken by the court in *Ange v. Bush*, which ruled that a challenge to the legality of the President's deployment of troops during the 1990 Persian Gulf crisis was non-justiciable under the political question doctrine.<sup>279</sup> Under the balance of institutional competencies model,

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<sup>272</sup> 203 F.3d 19 (D.C. Cir. 2000).

<sup>273</sup> *Id.* at 20-23. But the concurring opinion by Judge Silberman did suggest that the political question doctrine would preclude judicial review of both the statutory and constitutional claims. *See id.* at 25-28.

<sup>274</sup> 521 U.S. 811 (1997).

<sup>275</sup> *Clinton*, 203 F.3d at 21-22.

<sup>276</sup> Indeed, many of the same decisions that invoked the political question doctrine in abstaining from disputes under the resolution also invoked the doctrine of remedial discretion. *See Lowry v. Regan*, 676 F.Supp. at 338; *Sanchez-Espinoza v. Reagan*, 568 F. Supp. at 601; *Crockett v. Reagan*, 538 F.Supp. at 895.

<sup>277</sup> *See Lowry*, 676 F. Supp. at 338 (observing that the doctrine of remedial or equitable discretion "counsels judicial restraint with regard to 'challenges concerning congressional action or inaction during legislation.'" (quotations omitted)).

<sup>278</sup> 52 F. Supp. 2d 34, 40 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

<sup>279</sup> 752 F. Supp. at 512.

however, the *Ange* scenario would only become relevant if the President actually challenged the constitutionality of the Resolution. In the absence of such a challenge, the model suggests that the court should presume the constitutionality of the Resolution and resolve the dispute on the merits as if it were any other statutory claim.<sup>280</sup>

## CONCLUSION

With the modern ascendancy of judicial hegemony in constitutional interpretation, it has become fashionable to argue that judicial abstention in foreign affairs controversies is no longer necessary. But these arguments fail to recognize the inherent uniqueness of most foreign affairs controversies. This uniqueness has justified judicial abstention and deference on foreign affairs issues since the early days of the Republic, and contemporary developments do not suggest that the factors that counsel judicial restraint in this realm have become any less relevant. On the contrary, the political branches' distinct features and resources suggest that they continue to have institutional advantages over the courts in policing and interpreting the contours of the foreign affairs powers.

On the other hand, however, not all cases that implicate foreign affairs warrant judicial abstention. In certain contexts, such as where individual rights are implicated, or where Congress has legislated in the relevant foreign policy area, judicial intervention is appropriate, albeit with significant deference to the political branches. Such an approach accords with the notion that the scope of judicial involvement in foreign affairs should turn on the balance of institutional competencies of the various branches. In such a framework, judicial abstention and deference do not entail mutually exclusive categories, but rather reflect a continuum of judicial involvement in foreign affairs. For instance, in the wake of the September 11 attacks on the World Trade Center, courts have had to confront cases that required them to balance the national security prerogative of the executive branch against the individual rights claims of terrorist suspects. These cases seem to embrace a balance of institutional competencies framework, although in a disjointed and incoherent manner. The courts should take the extra step and make this approach explicit in order to remove much of the confusion and inconsistency that has marred the judicial role in foreign affairs controversies.

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<sup>280</sup>In any event, although the dispute in *Ange* did not implicate legislative standing, the court still had at its disposal procedural devices other than the political question doctrine that it could have used to avoid reaching the merits of the claim. Indeed, the trial court found that the plaintiff's claims were also barred on ripeness grounds. 752 F.Supp. at 515-16.

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