The Political Question Doctrines: *Zivotofsky v. Clinton* and Getting Beyond the Textual–Prudential Paradigm

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Since the Supreme Court’s opinion in *Baker v. Carr*, the political question doctrine has been viewed as consisting of textual and prudential factors. How these interrelate, and which type of factors to favor if these clash, has led to considerable confusion. In the recent case of *Zivotofsky ex rel. Zivotofsky v. Clinton*, Chief Justice Roberts may have attempted to settle these concerns by ignoring prudential factors altogether, characterizing political questions as concerned only with textual constraints.

This Note argues that a simple textual–prudential understanding of the political question doctrine is incomplete. In surveying all thirty-eight Supreme Court cases involving the political question doctrine since *Baker* was decided, it becomes clear that four competing conceptions of the political question doctrine have actually been formulated. Regardless of political question’s future, only by recognizing these competing conceptions can one make sense of the doctrine up to and through *Zivotofsky*.

**Table of Contents**

**Introduction** ............................................. 1002

I. **Unpacking the Textual–Prudential Paradigm** ............. 1004

   A. Defining the Doctrine ..................................... 1004

   B. The Origins of the Political Question Doctrine ........ 1005

   C. *Baker v. Carr* and Brennan’s Textual–Prudential Hybrid . 1007

   D. *Zivotofsky ex rel. Zivotofsky v. Clinton* and the Textualist View’s Supposed Triumph .......................... 1008

II. **Challenging the Paradigm: The Four Political Question Doctrines** ............................................. 1010

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INTRODUCTION

The political question doctrine has been criticized by scholars and jurists as inconsistently applied and incoherently formulated. In its traditional form, this doctrine requires the judiciary to defer on questions it considers more appropriate for the Executive or Legislative Branches. Particularly controversial is the doctrine’s combination of textual and prudential factors, the latter of which—as outlined in *Baker v. Carr*1—cautions courts not to hear cases that might discredit the judiciary or embarrass the other branches.2

Nevertheless, in the recent case of *Zivotofsky ex rel. Zivotofsky v. Clinton*,3 Chief Justice Roberts’s majority opinion framed the political question doctrine as only concerned with textual constraints on the Court’s authority.4 In response, Justices Sotomayor and Breyer, in response, chastised the majority for dismissing *Baker*’s prudential concerns, although they disagreed on how to frame these. Following *Zivotofsky*, scholars have debated whether Roberts’s textualist interpretation of the political question doctrine has formally abolished *Baker*’s prudential considerations.

This Note surveys all thirty-eight cases involving political questions since *Baker* was decided5 and argues that understanding the doctrine through *Baker*’s

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2. The textual view, in contrast, holds that only explicit constitutional restrictions should steer the judiciary’s hand.
4. This Note uses the term “textualist” in place of “classical.” Although the latter is more popular in the literature, the former is more historically and linguistically accurate.
5. This involved analyzing all cases where the political question doctrine was considered by the majority, concurrence, or dissent as having some importance or relevance to the case’s outcome. These
textual–prudential divide is critically incomplete. Rather, four competing conceptions of the political doctrine have been formulated. The first, developed by Justice Brennan in *Baker* and embraced by Justice Sotomayor in *Zivotofsky*, combines textual and prudential factors. The second, developed by Justices Frankfurter and Harlan and embraced by Justice Breyer in *Zivotofsky*, treats the political question doctrine as primarily prudential and centers on the Court’s institutional competence. The third, developed by Justice Douglas and embraced by Chief Justice Roberts in *Zivotofsky*, considers textual factors alone. Finally, Justice Scalia’s historical analysis—although absent in *Zivotofsky*—jettisons the political question doctrine altogether and focuses on the types of cases originally considered to be beyond the Court’s purview.

By framing the debate in this manner, this Note makes three primary contributions. First, and most basically, no other work has studied all thirty-eight post-*Baker* cases where the Court’s majority or dissent considered the political question doctrine. Nor has any previous study analyzed each Justice’s underlying rationale for the doctrine’s application (or lack thereof). Second, this is the first paper to argue that the textual–prudential understanding of the doctrine first presented in *Baker* and at the heart of *Zivotofsky* is incomplete, and that there are actually four distinct political question doctrines. Finally, such an account reveals the relative novelty of Roberts’s textual-based justifications.

Part I explores the most common conception of the political question doctrine prior to *Baker* and *Baker*’s combination of textual and prudential factors. These factors’ supposed fissure in *Zivotofsky* is also addressed, as is Roberts’s textualist triumph over Sotomayor and Breyer’s more prudential analyses.

Part II argues that viewing the political question doctrine solely through *Baker*’s textual–prudential hybrid is incomplete, and, in fact, three other political question doctrines have either remained or emerged since *Baker* was de-
cided. Thus, the four political question doctrines consist of: (1) Baker’s hybrid view, (2) the prudential view, (3) the textualist view, and (4) the historical–originalist view.

Part III reanalyzes the Court’s Zivotofsky decision through the preceding lenses. It then addresses this case’s impact on the lower courts. Finally, this Note briefly considers whether—as some scholars believe—the political question doctrine may be fading away altogether, as well as what this doctrine tells us about the relationship between judicial principles and politics.

I. UNPACKING THE TEXTUAL–PRUDENTIAL PARADIGM

A. DEFINING THE DOCTRINE

Few legal concepts have generated as much controversy as the political question doctrine. As we shall see, this is primarily due to the diverse ways in which this doctrine has been formulated. Regardless of implementation, however, the political question doctrine stands for a relatively simple concept: certain questions fall outside judicial control and are thus vested entirely in the other branches of government.

Scholars—although agreeing on little else—recognize that the political question doctrine consists of three core elements. First, the doctrine provides a preliminary barrier to review, considered by courts before addressing the merits of any particular issue. Second, if applicable, the doctrine prevents courts from moving forward; in other words, if an issue is found a nonjusticiable political question, the applicants’ argument—no matter how valid—is rendered irrelevant. Finally, the political question doctrine is generally considered a rule of judicial restraint rather than procedure. This distinguishes political questions from those involving standing, jurisdiction, or matters of immunity (whether grounded in statute or common law), which are all considered procedural requirements.

When to apply the doctrine, on the other hand, continues to produce considerable confusion. According to some scholars, the doctrine is profoundly imprecise, creating unnecessary chaos. For example, Louis Henkin derides the political question doctrine as a hodgepodge of different ideas “that has misled lawyers

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6. Louis Michael Seidman has also proposed multiple political question doctrines, although in a different manner and to make a different point: that this doctrine’s usage has been more motivated by the Court’s ideological preferences than any good faith reading of the law (a matter which is briefly discussed in section III.E). See Louis Michael Seidman, The Secret Life of the Political Question Doctrine, 37 J. MARSHALL L. REV. 441 (2004).


8. Id.

9. Id.

10. Id. at 678.

11. Id.
and courts to find in it things that were never put there.” 12 Other scholars have advocated eliminating the political question doctrine entirely (or claim that it never really existed in the first place)13 and stand ready to celebrate the doctrine’s official “death.”14 The next section begins untangling this controversy by detailing the political question doctrine’s origins.

B. THE ORIGINS OF THE POLITICAL QUESTION DOCTRINE

Like much else in constitutional law, the political question doctrine’s birth is usually traced back to Marbury v. Madison.15 This is ironic given Marbury bequeathed courts the awesome power of judicial review. Even while Chief Justice Marshall declared that judicial interpretation restrained the other two branches of government, however, he recognized limits to this power. Marshall made clear that “[t]he province of the court” was solely “to decide on the rights of individuals, not to enquire” how the other branches “perform duties in which they have a discretion.”16 Hence, “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”17

Given the generality of Chief Justice Marshall’s pronouncement, what constituted a “[q]uestion[ ] in [its] nature political”—or whether the prohibition applied to congressional matters—remained unclear. In 1849, the Court attempted to clarify this in Luther v. Borden.18 The Justices considered whether interpreting the Guarantee Clause was left to judicial or congressional discretion. Chief Justice Taney found this matter lay outside the judiciary’s bailiwick. Taney pointed out that the Guarantee Clause states the “United States shall guarantee to every State in this Union a republican form of government,”19 and understood “the United States” to mean Congress.20 Alongside this textual justification, Taney invoked a more prudential concern, noting that, if courts were allowed to decide what states were republican, it would risk disuniformity and collective confusion.21

13. See, e.g., Michael E. Tigar, Judicial Power, the “Political Question Doctrine,” and Foreign Relations, 17 UCLA L. Rev. 1135 (1970). This Note assumes that, by virtue of its consideration by the courts and its effect on judicial decisionmaking, the doctrine is very much real. As for the argument that it is analytically incoherent, this is briefly addressed in section II.D. Those who wish to delve deeper into this particular debate should consult Tigar’s article.
15. 5 U.S. (1 Cranch) 137 (1803); see also, 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, 248–49 (2002).
17. Id. (emphasis added).
20. Id.
21. Id. at 41 (raising a series of convoluted scenarios which the courts would have to resolve).
Following *Luther*, matters of political question were rarely invoked. Over sixty years later, *Pacific States Telephone & Telegraph Co. v. Oregon* asked the Court to decide whether—under the Guarantee Clause—a state lacked a republi-
can form of government.22 Like in *Luther*, the Court anchored its decision in
both textual and prudential concerns. According to the majority, allowing
courts to decide this question would permit citizens to challenge any state
decision with which they disagreed by assailing its form of government.23
Furthermore, successful challenges would dramatically aggrandize judicial
authority, empowering judges to tear down and rebuild states’ legislative
branches if they desired to do so.24 Consequently, the text conferred such
power on the legislature alone.

Another supposed political question emerged in *Coleman v. Miller*.25 In 1924,
Congress proposed the Child Labor Amendment after the Court had invalidated
similar legislation the prior year.26 Although the Kansas legislature rejected this
Amendment in 1925, it voted to ratify it in 1937.27 A group of Kansas
congressmen opposed the ratification, claiming this was not done within a
“reasonable time.”28 The Court responded that this was a “political question”
solely for Congress to determine,29 being structurally inherent in Congress’s
power.30 Furthermore, the Court found there was no criterion for judicial
determination here given the “great variety of relevant conditions, political,
social and economic” involved.31

Seven years later, in 1946, the Court came to a similar conclusion in
*Colegrove v. Green*.32 In this case, Illinois citizens alleged that certain congres-
sional districts unconstitutionally diluted their voting power.33 Writing for the
majority, Justice Frankfurter stated that this was a nonjusticiable political
question. According to Frankfurter, the history of apportionment was highly
partisan and lay well beyond judicial competence.34 Frankfurter did not mention
any textually rooted constraint, but simply summarized that “[c]ourts ought not
to enter this political thicket.”35

22. 223 U.S. 118 (1912).
23. *Id.* at 141–42 (noting that taxpayers could “assail in a court of justice the rightful existence of the
state”).
24. *Id.* at 142 (remarking that “as a consequence of the existence of such judicial authority, a power
in the judiciary must be implied… to build by judicial action upon the ruins of the previously
established government a new one”).
27. *Id.* at 259.
28. *Id.*
29. See *Coleman*, 307 U.S. at 450.
30. See *id.* at 454.
31. *Id.* at 453.
32. 328 U.S. 549 (1946).
33. *Id.* at 550–51.
34. *Id.* at 552.
35. *Id.* at 556.
These cases stand out in two ways: one is their rarity. Given the prevalence of potentially political questions, it remains striking that the Court so rarely had to decide whether to enter the “political thicket.” The reasons for this are best left to legal historians and more comprehensive accounts. Of concern here is how often the Court invoked prudential rather than simply textual justifications for its opinions. From Luther onward, the Justices explicitly considered the consequences of their decisions in addition to any textual restraints in making them. As the next section illustrates, this hybrid of textual and prudential considerations would come to define the modern political question doctrine.

C. BAKER V. CARR AND BRENNAN’S TEXTUAL–PRUDENTIAL HYBRID

Nearly two decades after Colegrove, the Supreme Court made a striking about-face regarding redistricting’s justiciability in Baker v. Carr.36 Not only did Baker upend Colegrove’s conclusions, but it also dramatically revised Colegrove’s reasoning. In the process, the Court replaced what was essentially an ad hoc judicial determination of what constituted a political question with a full-fledged doctrine.

Although the details varied, Tennessee voters faced a similar situation in Baker as Illinois’s had in Colegrove: a recent reapportionment statute dramatically shifted the political landscape, amassing disproportionate power in more rural regions.37 Affected voters sued, claiming that this violated “equal protection of the laws” by failing to guarantee “one person, one vote.”38 The Court found justiciability.

In finding this controversy justiciable, Justice Brennan sought to create a unified doctrine out of the prior political question cases. Brennan, writing for the majority, found that “questions in their nature political” had arisen in six ways.39 First were cases, like Luther, where there was “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”40 According to such cases, the Constitution’s text specifically directed certain questions beyond the judiciary’s purview.41 Second were cases (presumably like Coleman) where there was “a lack of judicially discoverable and manageable standards for resolving” the issue at hand.42 This concern was primarily structural, focused on what courts were ill-equipped to handle vis-à-vis the other two branches.

The final four considerations were prudential, or practical, concerns that courts might face by entering the political thicket. According to Justice Bren-

39. See id. at 217. Of note is that Justice Brennan discussed these by subject matter (such as foreign affairs, Indian affairs, etc.) and only gave the six specific factors in summary.
40. Id.
41. See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).
42. Baker, 369 U.S. at 217.
nan, courts should not intervene when faced with “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.” Although Brennan did not say so, here he may have been thinking of *Pacific States Telephone & Telegraph*, and the Court’s refusal to grant judges the power to tear down and replace state governments based upon jurisprudential whim.

Brennan’s final three factors—although less directly rooted in precedent—stemmed from similar concerns. These consisted of (1) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; (2) “an unusual need for unquestioning adherence to a political decision already made”; or (3) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” Brennan concluded that “[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence.”

From practically their formulation, all six factors have engendered considerable confusion. That said, Justice Brennan’s six categories lent analytic coherence to what was previously ad hoc decision making based more on a vague sense of what judges found political than on any principled criteria. Furthermore, *Baker* vested textual and prudential considerations with equal weight, not obviously granting any one factor paramount importance. It was into this minefield that *Zivotofsky* waded.

D. *ZIVOTOFSKY EX REL. ZIVOTOFSKY V. CLINTON* AND THE TEXTUALIST VIEW’S SUPPOSED TRIUMPH

In *Zivotofsky*, the parents of a child born in Jerusalem challenged the executive’s refusal to identify his official birthplace as Israel. Putting the merits aside, the Court considered whether the case was justiciable. The majority answered affirmatively.

The majority opinion, written by Chief Justice Roberts, pointedly recognized only two of *Baker*’s six factors. According to Roberts, a controversy involves a political question when there is either “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.” Although Roberts acknowledged that these factors “demand[] careful examination of the textual, structural, and historical evidence put forward by the parties,” he found

43. *Id.*
44. *Id.*
45. *Id.*
46. See, e.g., Pettinato, supra note 14, at 62 (describing how Brennan’s attempt to create a unified approach ushered in the modern political question doctrine).
47. 132 S. Ct. 1421, 1424 (2012).
48. *Id.* at 1427.
they alone were determinative.49

Justice Sotomayor, in concurrence, noted the majority’s striking omission of Baker’s final four factors.50 Nevertheless, although recognizing that Baker demanded a more extensive analysis, she too downplayed this case’s prudential considerations. Instead, Sotomayor wrote that prudential factors would rarely prove critical and focused her analysis on textual grounds to reach the same conclusion as Chief Justice Roberts and the majority.51

Justice Breyer alone, writing in dissent, found prudential justifications dispositive. The factors he recognized, however, were different from those outlined in Baker. First, Breyer claimed that judges lacked the information, expertise, or experience to wade into foreign affairs.52 Second, decisions involving the Middle East made this case particularly difficult, risking “inadvertently jeopardizing sound foreign policy decisionmaking by the other branches of Government.”53 Third, the injury that Zivotofsky claimed was akin more to an “ideological interest” than a concrete and particularized harm.54 And finally, it was best for all concerned if the Court allowed the other branches to work out this issue amicably and respectfully.55

Some scholars have read Zivotofsky as a misinterpretation or outright refutation of much of what Baker stands for.56 After all, the majority ignored all four prudential factors, grounding the political question doctrine on textual concerns alone. As one scholar observes, “Zivotofsky thus displaces Baker’s six-factor test and substitutes [Baker’s first two factors] in its place.”57 According to another scholar, despite Baker’s clear holding to the contrary, one can read Zivotofsky “as discouraging courts from [any] consequentialist concerns when

49. Id. at 1430.
50. Id. at 1431 (Sotomayor, J., concurring in part and in the judgment) (“I understand the inquiry required by the political question doctrine to be more demanding than that suggested by the Court.”).
51. Id. at 1435 (“In this case . . . the Court of Appeals majority found a political question solely on the basis that this case required resolution of an issue ‘textually committed’ to the Executive Branch. Because there was no such textual commitment, I respectfully concur in the Court’s decision to reverse . . . .”).
52. Id. at 1438 (Brennan, J., dissenting).
53. Id. at 1440.
54. Id.
55. Id. at 1441.
57. Szurkowski, supra note 56, at 348; see also The Supreme Court—Leading Cases, 126 Harv. L. Rev. 176, 314 (2012) (stating that “the Court jettisoned the last four Baker factors”).
determining the applicability of the political question doctrine." In other words, absent textual barriers or unmanageable standards, justiciability exists—consequences be damned. Indeed, even those Justices in concurrence and dissent showed little adherence to Baker’s last four factors. As Carol Szurkowski summarizes, if any Justice “had examined Zivotofsky’s claims under the Baker framework, it would have signaled that the test continues to be the yardstick.” Having failed to do so, the Court indicated “that the Baker analysis is no longer essential to political question determinations.”

So what has become of Baker? Has it been fundamentally reshaped or even overruled by Zivotofsky, as the preceding scholars assert? Any such conclusions are premature. This is because, as this Note reveals, the political question doctrine has never relied on Baker’s reasoning alone. Rather, Baker has continually competed with three other formulations of the doctrine, and there is no reason to believe that Zivotofsky has brought this struggle to an end.

II. CHALLENGING THE PARADIGM: THE FOUR POLITICAL QUESTION DOCTRINES

This Part reveals, and analyzes, the Court’s four political question doctrines. The first section details Justice Brennan’s hybrid view in Baker, which was assumed to hold sway until Zivotofsky. There is some truth to this assumption. This view is complicated by the next three sections, however, which discuss other conceptions of the political question doctrine that have proven critical even after Baker’s formulation.

A. THE HYBRID VIEW

As discussed earlier, in Baker, Justice Brennan attempted to combine the principles inherent in previous political question cases into a single account. To do so, he combined the textual justifications inherent in Marbury and Luther with the more prudential concerns invoked in Pacific States Telephone & Telegraph and Coleman. Thus, Baker held that courts should determine whether a case is justiciable by considering six separate metrics: (1) whether there “is found a textually demonstrable constitutional commitment of the issue to a coordinate political department”; (2) whether there is “a lack of judicially discoverable and manageable standards for resolving it”; (3) whether there is an “impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”; (4) whether there is an “impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; (5) whether there exists “an unusual need for unquestioning adherence to a political decision already made”; and (6) whether there is “the potentiality of embarrassment from multifarious

58. COLE, supra note 56, at 24.
59. Szurkowski, supra note 56, at 360.
60. Id. at 361.
pronouncements by various departments on one question.”

That said, Justice Brennan provided no explanation for which, if any, of these factors were dispositive, or how to move forward if they happened to clash. Fortunately, in those cases immediately following Baker, this did not prove an issue. In Davis v. Mann and Lucas v. Forty-Fourth General Assembly of Colorado, the Court again found that applying all six Baker factors did not render reapportionment challenges nonjusticiable. In Reynolds v. Sims, this was applied to congressional apportionments as well; although the scales differed, the Court’s Baker analysis was applied in the same manner as in Davis and Lucas.

Given that Baker was born in redistricting, it makes sense that Justice Brennan’s criteria would neatly apply in such cases. Applying Baker outside this area, however, has proven somewhat more difficult. The first issue for the Court has been whether, and how, to evaluate all six factors. The Court has rarely done so: of those cases in which Baker has been invoked, the Court has usually considered only one or two of its factors. Second, the Court has not settled whether textual or prudential concerns are more important and which factors have precedence within these categories. Finally—and perhaps most frustratingly—even when the Court has analyzed most or all of these factors, it has rarely made it known which are dispositive.

These challenges have perhaps been most prevalent in cases dealing with legislatures’ internal processes. In Powell v. McCormack, a congressman claimed that fellow members had unconstitutionally excluded him from his House seat. The Court provided an exhaustive analysis of whether there existed a textually demonstrable constitutional commitment, examining everything from the pre-Convention practices of the English Parliament to the basic principles underlying American democracy. Following this analysis, in a brief two paragraphs entitled “Other Considerations,” the majority quickly considered and then disposed of the remaining five Baker factors.

In 1990, the Court came to a similar conclusion, albeit through different reasoning, in United States v. Munoz-Flores. In this case, a defendant asserted that his conviction was unconstitutional given that the underlying law had violated the Origination Clause. The Court focused on whether, as the United States contended, deciding this matter would show a “lack of respect” for the
House of Representatives. The Court then considered whether “judicially manageable standards” existed. The Court answered affirmatively, stating that such standards had been developed in previous cases (with little explanation of how). Although the Court did not bother to consider the other four factors, it concluded that “none of the characteristics that Baker v. Carr identified as essential” to blocking justiciability were present.

Beyond redistricting and internal political processes, foreign affairs have occasionally involved political concerns, although (as the next section reveals) here Baker has been less consistently applied. In First National City Bank v. Banco Nacional de Cuba, Justice Rehnquist held that judges could examine counterclaims filed by United States banks against Cuban banks without fear of violating the state action doctrine. In dissent, Justices Brennan and Marshall enumerated factors that are hard to locate in Baker’s original formulation. Seven years later, in Goldwater v. Carter, Justice Brennan’s dissent criticized Justice Rehnquist for ignoring Baker in holding the dispute nonjusticiable, yet then seemed to conflate that test’s textual and prudential factors in his analysis.

Unlike the majorities in First City National Bank and Goldwater, the majority explicitly used Baker’s hybrid approach in Japan Whaling to find that wildlife conservation groups could bring suit against certain cabinet members who had allegedly failed to enforce statutory whaling quotas. Justice White found that “Baker plainly held . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.” Nonetheless, it is unclear which Baker factors were invoked here. Nor did White’s subsequent reasoning (that Congress and the Executive still have a

71. Id. at 390.
72. See id. (“[D]isrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.”).
73. Id. at 395.
74. Id. at 396.
75. Id.
77. Id. at 768. Distinguishing between the political question doctrine and the state action doctrine has generated some confusion. See, e.g., Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1385 (2006) (remarking that both doctrines “shield[] certain categories of conduct from constitutional review,” though implying they are analytically distinct). Regardless of these two doctrines’ differences, the cases cited in this Note only consider the Court’s clear application of the political question doctrine.
78. See First Nat’l City Bank, 406 U.S. at 788 (Brennan, J., dissenting) (listing “absence of consensus on the applicable international rules, . . . the sensitivity of the issues to national concerns,” and the executive’s sole ability to provide a fair remedy).
80. See id. at 1007 (Brennan, J., dissenting) (“The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.”).
82. Id. at 230.
“premier role . . . in this field”) provide much illumination.\(^8\)

Some cases have been clearer. In *County of Oneida*,\(^8\) the Court found that Indian tribes had a justiciable right of action for a state’s centuries-old violation of the common law. Writing for the majority, Justice Powell stated that the Constitution did not confer exclusive authority for Indian affairs to Congress, and the Court could therefore consider whether the counties had given convincing reasons for “unquestioning adherence” to its prior decisions.\(^8\) In *Maryland v. United States*,\(^8\) Justice Rehnquist, in dissent, wrote at some length on *Baker’s* fourth factor, or “the impossibility of deciding without an initial policy determination.”\(^8\) Here, the Court had considered the United States’s recent civil antitrust settlement with AT&T. Rehnquist felt that this decision required the Court to determine “whether the benefits that might be obtained in a lawsuit are worth the risks and costs,” and thus concerned a policy question well outside the Court’s discretion.\(^8\)

Nevertheless, even in explicitly considering *Baker’s* textual and prudential factors, the Justices have refused to name one factor as dispositive or explain why the others bear no application to the case at hand. This is not to paint *Baker* as somehow wrongly decided or intellectually incoherent. Rather, these cases reveal *Baker* as less a unified account and more a hodgepodge of different discretionary factors. As the next section makes clear, some of these factors formulate an alternative political question doctrine, which has long competed with *Baker’s* hybrid approach.

\[\text{B. THE PRUDENTIAL VIEW}\]

The prudential view is concerned with preventing the judiciary from interfering in matters in which it lacks institutional competence and where such interference could engender backlash from the other branches. In other words, “prudentialists” will find issues nonjusticiable when (1) the text is not altogether clear and (2) the judiciary risks stepping on the other branches’ toes.\(^8\)

Although such concerns over judicial involvement in political questions have existed at least since *Luther*, these concerns first proved dispositive in Justice Frankfurter’s *Colegrove* opinion. As explored earlier, here the majority found nonjusticiability based not on any clear textual constraint, but due to the judiciary’s institutional limitations.\(^9\) Following Frankfurter’s lead, Alexander

\[^8\] Id.
\[^8\] See id. at 249–50. The Court rejected the “unquestioning adherence” argument and found the case justiciable. *Id.*
\[^8\] Id. at 1006 (Rehnquist, J., dissenting from summary affirmance).
\[^8\] Id.
\[^8\] As this section makes clear, although the prudential view is animated by similar considerations of restraint as *Baker’s* final four factors, it does not necessarily correspond one-to-one with these factors.
\[^8\] See supra notes 32–35 and accompanying text.
Bickel famously justified this prudential approach in light of the Court’s “passive virtues.”\textsuperscript{91} According to Bickel, judicial decision making should be avoided in three particular circumstances: (1) when judges lack the knowledge or expertise to opine on a particular matter; (2) when their actions would invite considerable political backlash; or (3) when this might put courts in conflict with the other branches.\textsuperscript{92} Focusing specifically on political questions, Bickel then proposed an alternative set of criteria to \textit{Baker}'s.\textsuperscript{93} In Bickel’s formulation, courts should find issues nonjusticiable (1) when they are strange or resistant to principled resolution; (2) when they are of great political momentousness, and therefore more likely to “unbalance judicial judgment”; or (3) when resolution would threaten the courts’ credibility in the eyes of the public or the executive or legislative powers.\textsuperscript{94}

This approach to political questions has proven popular among certain Justices. In his \textit{Baker} dissent, Justice Frankfurter reprised much of his \textit{Colegrove} opinion, arguing that complicated and politically fraught processes like redistricting lay well beyond “settled judicial experience” or ability.\textsuperscript{95} Taking on Frankfurter’s mantle, Justice Harlan’s dissent in \textit{Reynolds} further fixated on institutional expertise.\textsuperscript{96} In Harlan’s view, in \textit{Baker} and the present case, the majority provided only “generalities in elaboration of its main thesis,” and in doing so demonstrated “how far removed [the matter of redistricting is] from fields of judicial competence.”\textsuperscript{97}

Justice Harlan reasoned similarly in \textit{Oregon v. Mitchell}.\textsuperscript{98} In this case, the Supreme Court held that courts could determine whether Congress had exceeded its powers by enfranchising eighteen-year-olds and establishing residency requirements for presidential elections. Like in \textit{Reynolds}, Harlan disagreed, claiming such questions were inappropriate for judicial resolution because they lay “beyond the institutional competence” of the judiciary and were thus best left for congressional determination.\textsuperscript{99}

Two decades later, Justice Frankfurter and Bickel’s view was echoed by Justice O’Connor in \textit{Davis v. Bandemer}.\textsuperscript{100} Here, a suit challenged Indiana’s 1981 state apportionment statute, arguing that the statute unconstitutionally diluted the votes of Indiana Democrats.\textsuperscript{101} Unlike the majority, Justice O’Connor

\textsuperscript{91.} See generally Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111 (1962).
\textsuperscript{92.} See id. at 111–83.
\textsuperscript{93.} See id. at 184.
\textsuperscript{97.} \textit{Id.} at 622.
\textsuperscript{98.} 400 U.S. 112 (1970).
\textsuperscript{99.} \textit{Id.} at 206–07 (Harlan, J., concurring in part and dissenting in part).
\textsuperscript{100.} 478 U.S. 109 (1986).
\textsuperscript{101.} \textit{Id.} at 113.
would have found the gerrymandering claims nonjusticiable.\footnote{102. Id. at 144 (O’Connor, J., concurring in the judgment).} According to the Justice, this was an issue of momentous importance, and “[t]o turn these matters over to the federal judiciary” was “to inject the courts into the most heated partisan issues.”\footnote{103. Id. at 145.} In O’Connor’s view, such issues exceeded judicial competence, opening the door to a “pervasive and unwarranted judicial superintendence of the legislative task of apportionment.”\footnote{104. Id. at 147.} To underline the point, O’Connor quoted directly from Frankfurter, warning the Court against taking further steps into the “political thicket.”\footnote{105. Id. at 148.}

Although the prudential view has often failed to capture a Court majority in matters involving political process such as redistricting, it has found favor among certain Justices. For example, in *Nixon v. United States*, Justice Souter concurred with the majority that the manner of President Nixon’s impeachment was nonjusticiable.\footnote{106. See 506 U.S. 224, 252 (1993) (Souter, J., concurring in the judgment).} Souter’s reasoning went well beyond *Baker’s* six factors, however: citing Bickel, the Justice advised the Court to heed “prudential concerns about the respect we owe the political departments.”\footnote{107. Id. at 253. Nevertheless, Souter acknowledged that there could be Senate actions so egregious "as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence," such as determining impeachment by the flip of a coin. Id. at 253–54.} Although Souter admitted that “[n]ot all interference is inappropriate or disrespectful,” he believed this particular “occasion [did] not demand an answer.”\footnote{108. Id. at 253.}

The prudential view has proven most influential in cases involving foreign affairs. Only a year after *Baker*, for example, Justice Harlan commanded a Court majority in *Banco Nacional de Cuba v. Sabbatino*.\footnote{109. 376 U.S. 398 (1964).} In this case, the Court found that a suit between Cuban and American residents was nonjusticiable given its impact on international politics. According to Justice Harlan, such a decision could negatively impact foreign affairs and undermine the other branches.\footnote{110. Id. at 431.} These “possible adverse consequences” cautioned against judicial involvement.\footnote{111. Id. at 432 (noting that “[p]iecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached”).}

In *First National City Bank*, although the Court found a different Cuban–American suit justiciable, the majority was again careful to do so for prudential reasons.\footnote{112. First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).} Justice Rehnquist, writing for the majority, first clarified that if the Court’s approach threatened to undermine the other branches, it “should not be applied by the courts.”\footnote{113. Id. at 768.} However, here the executive had made clear that no
such consequences should be feared, and the Court was thus free to act. Justice Powell concurred in the judgment. According to Powell, “unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches,” it is important to hear such cases.

Indeed, after Justices Frankfurter and Harlan, Justice Powell proved the biggest advocate of the prudential view. Concurring in *Goldwater v. Carter*, Powell even sought to reconcile this approach with *Baker’s* hybrid model. According to Powell, political question cases should involve three questions: (1) “Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?”; (2) “Would resolution of the question demand that a court move beyond areas of judicial expertise?”; and (3) “Do prudential considerations counsel against judicial intervention?” Powell answered each question in the affirmative. The Justice took a similar view—this time for the majority—in *Fiallo v. Bell*. In *Fiallo*, the Court held that Congress’s ability to expel or exclude immigrants lay beyond the judiciary’s institutional competence to review. Before quoting directly from Justice Frankfurter, Justice Powell remarked that immigrants’ entry conditions, their basis for classification, and the grounds on which their stays were terminated all exceeded judges’ informational and vocational expertise.

As the preceding section illustrates, Justice Frankfurter and Bickel’s prudential view has marched alongside *Baker’s* hybrid approach. Although the latter focuses on six narrow categories, the broader prudential view asks judges to step back and consider whether it is worth entering the political thicket in the first place. Of course, this approach has problems of its own. First, it is unclear how to gauge when issues are simply too political to tackle. This encourages a vague vision of judicial decision making and chances considerable unpredictability. Second, this approach risks judicial abdication rather than judicial prudence: if judges possess the authority to alleviate a profound social ill, many might find it irresponsible for them not to act. Finally, and perhaps most controversially, this approach is profoundly concerned with consequences. If

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114. *See id.* ("[T]he branch of the government responsible for the conduct of those foreign relations has advised us that such a consequence need not be feared in this case.").
115. *Id.* at 775 (Powell, J., concurring in the judgment).
116. *Id.* at 775–76.
118. *Id.* at 998 (Powell, J., concurring).
119. *See id.* at 998–1000.
120. 430 U.S. 787 (1977).
121. *See id.* at 799.
122. *Id.* at 796 (remarking that, “since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary”).
123. This is perhaps best illustrated by Justice Souter’s concurrence in *Nixon*. *See supra* text accompanying notes 106–08. Although urging the Court to show prudent restraint in this case, he neglects to detail the reasons why it should do so.
one believes the text alone should govern judicial decision making—regardless of the effects this may have on the other branches—questions of prudence are simply irrelevant to such textualist concerns. Although less frequently invoked, certain Justices have taken just such a textualist approach.

C. THE TEXTUALIST VIEW

Unlike the two preceding views, the textualist view finds political questions dependent upon the Constitution’s text and structure alone. How judicial involvement will affect the other branches is wholly irrelevant; all that matters is what the Constitution itself requires. As intuitive as this approach may appear in our textualist age, this view has only really gained prominence regarding political questions in the last few years.

Herbert Weschler explored a textualist approach to political questions at significant length. Looking back at the Court’s decision in Luther, Wechsler criticized the Court’s subsequent focus on prudential considerations over textually grounded reasoning; doing so, Wechsler claimed, risked sacrificing principled decision making for partisan interests, egregiously intermingling policy and law. In Wechsler’s view, “[A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised . . .” If so, the Court’s hands are tied and the case may not be heard.

Although Justice Brennan adopted Wechsler’s textual criteria when formulating the first two Baker factors, he paired these with the type of prudential concerns that Wechsler explicitly protested against. In Massachusetts v. Laird, Justice Douglas became the first on the Court to adopt Wechsler’s purely textualist approach. In a forceful dissent from a motion for leave to file a bill of complaint, Douglas criticized his colleagues for refusing to consider the Vietnam War’s constitutionality. In doing so, Douglas also critiqued Baker’s use of prudential concerns in determining the existence of a political question.


126. Id. at 7–8.

127. See Ralph J. Bean, Jr. The Supreme Court and the Political Question: Affirmation or Abdication?, 71 W. VA. L. REV. 97, 102 (1969) (stating that Wechsler found comfort in the following dicta from Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821): “It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should.”).

Justice Douglas first found that there was no textually demonstrable commitment of the issue to another branch, going on to determine that the “standards that are applicable are not elusive.”\textsuperscript{129} He then dismissed all four of Baker’s prudential factors. According to Douglas, the question was not one of policy, but of whether the executive had constitutional permission to enter the war without congressional approval.\textsuperscript{130} Offending another branch of government was irrelevant: “[T]he duty of this Court is to interpret the Constitution . . . .”\textsuperscript{131} Consequently, all that mattered was “whether under our Constitution presidential wars are permissible.”\textsuperscript{132}

Justice Douglas again took a purely textualist view in 1972’s \textit{Roudebush v. Hartke}.\textsuperscript{133} Here the Court was asked to determine whether a Senate seat’s recount should go forward. Douglas dissented. In his view, all that mattered was whether there was a “textually demonstrable constitutional commitment” of such questions to the Senate.\textsuperscript{134} The Justice answered affirmatively and, consequently, would have denied justiciability.\textsuperscript{135}

Despite Justice Douglas’s example, a purely textualist analysis of political questions has not proven popular. Out of the thirty-eight cases reviewed (since Baker and besides Zivotofsky) only one other—\textit{Nixon v. United States}—took this approach.\textsuperscript{136} Nevertheless, \textit{Nixon} has proven of enduring importance because—for the first time—the textualist view commanded a majority vote. In this case, Chief Justice Rehnquist, writing for the Court, not only neglected prudential concerns but also merged both textual factors. Echoing Wechsler, the Chief Justice found that “the 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”,\textsuperscript{137} rather, a lack of standards indicates that no textual commitment exists. In conclusion, the Chief Justice reiterated the textualist view, summarizing that “courts possess power to review either legislative or executive action that transgresses identifiable textual limits.”\textsuperscript{138}

Given the modern popularity of textualism, it may seem odd that this approach has rarely found favor in resolving political questions.\textsuperscript{139} Two things likely help explain this. First, from the doctrine’s beginning, prudential factors have been considered in regard to political questions. \textit{Luther} contained both

\begin{enumerate}
\item\textsuperscript{129} \textit{Laird}, 400 U.S. at 892 (Douglas, J., dissenting).
\item\textsuperscript{130} \textit{Id.} at 893 (“[T]he issue in this case is not whether we ought to fight a war in Indochina, but whether the Executive can do so without congressional authorization.”).
\item\textsuperscript{131} \textit{Id.} at 894.
\item\textsuperscript{132} \textit{Id.} at 896.
\item\textsuperscript{133} 405 U.S. 15, 30 (1972) (Douglas, J., dissenting in part).
\item\textsuperscript{134} \textit{Id.} at 30.
\item\textsuperscript{135} \textit{Id.} at 33.
\item\textsuperscript{136} 506 U.S. 224 (1993).
\item\textsuperscript{137} \textit{Id.} at 228.
\item\textsuperscript{138} \textit{Id.} at 238.
\item\textsuperscript{139} See \textit{Molot}, supra note 124, at 30.
\end{enumerate}
textual and prudential justifications, for example, and Pacific States Telephone & Telegraph, Coleman, and Colegrove were decided almost exclusively on consequentialist grounds. Thus, the political question doctrine’s origins are rooted in extraconstitutional factors, and following precedent would therefore lead to invoking these considerations. Second, the nature of a political question (i.e., determining what is political) seems to invite speculation that transcends constitutional limitations. Nowhere does the Constitution distinguish between what constitutes law and what constitutes politics. As a result, Justices have long felt it necessary to find other determinants. Indeed, the final view—discussed below—directly addresses this issue, upending the very notion of a political question.

D. THE HISTORICAL–ORIGINALIST VIEW

According to the historical–originalist view, the very concept of a political question doctrine is somewhat absurd. Congress and the President have traditionally handled certain types of cases, and the courts have traditionally stayed away from these. When such cases arise, the Court’s role is not to go through a checklist of categories before wading in, but simply to stick to its knitting. In Louis Henkin’s view, the political question doctrine is “an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there.”140 Thus, “nothing but confusion is gained by giving [the component doctrines] special handling in selected cases.”141

This begs the question: what types of cases did courts traditionally shy away from? According to Robert Pushaw, determining where “‘We the People’ entrusted their federal government representatives with complete latitude” demands analyzing what issues “d[id] not fit within the usual framework of making, executing, and judging the law,” such as “veto, impeachment, appointments, and military and foreign policy decisions.”142 Regardless of what this full list entails, forming it requires a historical understanding of what originally constituted a political question.

In United States v. Richardson, Chief Justice Burger adopted an early version of this view.143 In this case, a group of citizens demanded that CIA records be audited and revealed to the public.144 Burger, writing for the majority, rejected this claim on historical–originalist grounds: according to the Chief Justice, “the subject matter [was] committed to the surveillance of Congress, and ultimately to the political process.”145 Concluding otherwise

140. Henkin, supra note 12, at 622.
141. Id.
142. Id. at 1196.
144. Id. at 168.
145. Id. at 179.
“would mean that the Founding Fathers intended to set up something” more akin to an “Athenian democracy” than a representative republic. 146

Undoubtedly, the historical–originalist view’s most passionate advocate has been Justice Scalia. In Rutan v. Republican Party of Illinois, the Court was asked to resolve various challenges to the Illinois Republican Party’s policies of hiring and firing employees based on party affiliation. 147 The Court found these claims justiciable and found such practices to be in violation of the First Amendment. 148 In dissent, Justice Scalia surveyed the Bill of Right’s historical background and argued that such questions were left solely to the elected branches. 149 In Scalia’s view, to ignore “[s]uch a venerable and accepted tradition” was to leave “the realm of law and enter[] the domain of political science.” 150 Scalia repeated these claims in 1996’s Board of County Commissioners v. Umbehr. 151 This case again involved public employees fired based on their party affiliations, and the Court again found justiciability. 152 Scalia first quoted from his dissent in Rutan, protesting that “today’s cases involve . . . an American political tradition as old as the Republic.” 153 Accordingly, Scalia believed that the Court had absolutely no authority to enter the fray.

Given the rarity of this view in previous political question cases, it is remarkable that Justice Scalia’s historical–originalist approach won the day in the more recent Vieth v. Jubelirer. 154 Here, voters brought action against Pennsylvania, challenging the constitutionality of a redistricting plan. 155 For the first time since Baker, the Court held that such a claim was nonjusticiable. 156 After rotely reciting the six Baker factors, Scalia, announcing the judgment of the Court, critiqued the confusion these factors had generated and remarked in dicta that “[t]hese tests are probably listed in descending order of both importance and certainty.” 157 Stating that only the second factor was at issue here (whether judicially discoverable and manageable standards were available), the Justice interpreted this question through an historical lens. According to Scalia, usurping the state’s redistricting plan went against the judiciary’s power to “act in the manner traditional for English and American courts,” which required them to be “governed by standard, by rule.” 158 In Scalia’s view, the Court’s long foray into

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146. Id.
148. Id. at 79.
149. See id. at 95–96 (Scalia, J., dissenting).
150. Id. at 95, 113.
152. Id. at 672.
153. Id. at 688 (Scalia, J., dissenting).
155. Id. at 272.
156. Id. at 305.
157. Id. at 278.
158. Id.
redistricting had generated nothing but “inconsistent, illogical, and ad hoc” rules and standards, and the Court therefore had little choice but to exit this minefield.  

Although only Justice Scalia\(^{160}\) has fully endorsed the historical–originalist view of political questions, cases like Vieth demonstrate this view’s potential staying power. Nonetheless, by remaining consistent to this approach, one eliminates all six Baker criteria. Given the confusion that Baker has generated, many scholars and jurists might well cheer such an outcome.\(^{161}\) If Zivotofsky is any guide, however, the Supreme Court seems unready to take this radical step.

III. ZIVOTOFSKY RECONSIDERED

This Note’s final Part reassesses Zivotofsky\(^{162}\) in light of the different versions of the political question doctrine and then discusses the case’s influence on the circuit and district courts. This leads to three conclusions. First, Chief Justice Roberts’s, Justice Sotomayor’s, and Justice Breyer’s opinions can all be located within the preceding approaches. Second, Roberts’s textual-based reasoning is quite unusual in cases involving political questions, especially when it comes to those concerning foreign affairs. Third, Zivotofsky has yet to have a major impact on the lower courts. This Part then considers whether the notion of a nonjusticiable political question is fading away, and the relationship between principle and politics in regards to the political question doctrine’s different versions.

A. APPLYING THE DIFFERENT VIEWS

In Zivotofsky, Chief Justice Roberts takes the textualist view adopted by his predecessor in Nixon.\(^{163}\) Like Chief Justice Rehnquist, Roberts excludes all four prudential factors, focusing solely on whether a textual commitment is present or whether judicial standards are available.\(^{164}\) Roberts’s analysis in Zivotofsky, like Rehnquist’s in Nixon, also finds justiciability: nowhere does the text restrain the Court’s hand, nor are judicial standards impossible to define.\(^{165}\) In the words of Chief Justice Marshall—and quoted by Herbert Weschler—Roberts’s approach demands the Court “not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.”\(^{166}\)

\(^{159}\) Id. It is ironic that Justice Scalia’s historical–originalist account reached the exact same conclusion as Justice Frankfurter and Justice Harlan’s prudential approaches, a type of jurisprudence that Scalia fiercely rejected.

\(^{160}\) And perhaps Justice Thomas (who has joined Justice Scalia in these cases), though he has not written on it.

\(^{161}\) Although, depending on their interpretive philosophy, perhaps not for originalist reasons.


\(^{163}\) See supra Section I.D for a more thorough summary of each opinion.

\(^{164}\) See Zivotofsky, 132 S. Ct. at 1427–28.

\(^{165}\) See id. at 1431.

\(^{166}\) See Wechsler, supra note 125, at 10.
In concurrence, Justice Sotomayor adopts Baker’s hybrid approach. The Justice pointedly lists all six Baker factors and then explains how these apply.167 Interestingly, Sotomayor openly recognizes the confusions that Baker has generated and the uncertainty over which factors should take precedence and how they interrelate.168 In response, and in line with Justice Scalia’s Vieth opinion,169 she subordinates the latter to the former, finding it rare that prudential concerns should be dispositive.170 Whether this attempt to revive and revise Baker is successful is best left to other accounts. That said, Sotomayor seeks to partly preserve Justice Brennan’s hybrid approach.

Justice Breyer’s dissent, at first blush, seems the most difficult to fit within any particular view. Like Justice Sotomayor, he lists the six Baker factors, but then resolves the case (finding against justiciability) based on four factors outside of this framework. Looking at these factors, however, makes it clear that Breyer has embraced Justice Frankfurter and Bickel’s prudential analysis. All of Breyer’s concerns deal with, first, the boundaries of judicial competence, and second, the momentousness of the Court’s decision. According to Breyer, cases like this rest upon information unavailable to the courts, leaving them unable to have a fully informed opinion.171 Furthermore, “in the Middle East, administrative matters can have implications that extend far beyond the purely administrative.”172 Like Justice Harlan’s prudential concerns in Banco Nacional de Cuba, Breyer fears that disrupting this balance may “inadvertently jeopardiz[e] sound foreign policy decisionmaking by the other branches of Government.”173 In conclusion, Breyer even quotes Justice Souter’s concurrence in Nixon, noting that cases of such great importance demand that the other branches attempt to work things out themselves.174

B. PRECEDENTIAL COMPARISONS

As the preceding section makes clear, all four political question doctrines have varying degrees of precedential support. That said, Baker’s hybrid view has proven the most popular: out of the thirty cases that turned on the political question doctrine decided since Baker (not counting Zivotofsky),175 the hybrid

167. See Zivotofsky, 132 S. Ct. at 1431–35 (Sotomayor, J., concurring in part and in the judgment).
168. See id. at 1431 (“Baker left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication.”).
169. Although, as should be clear, Sotomayor’s analysis bears no other resemblance to Scalia’s historical–originalist approach.
170. Id. at 1434 (Sotomayor, J., concurring in part and concurring in the judgment) (“To be sure, it will be the rare case in which Baker’s final factors alone render a case nonjusticiable.”).
171. Id. at 1437–38 (Breyer, J., dissenting).
172. Id. at 1439.
173. Id. at 1440.
174. Id. at 1441.
175. Note that this is a subset of the thirty-eight post-Baker cases studied in this Note—eight cases did not hinge on a political question, although the doctrine was discussed in a concurrence or dissent.
view was used by the majority or plurality in twenty of these;\textsuperscript{176} the prudential view in seven;\textsuperscript{177} the textualist view in one;\textsuperscript{178} and the historical–originalist view in two.\textsuperscript{179}

Nevertheless, in cases involving foreign affairs, the prudential view has had the greatest influence. Of the five cases concerning foreign affairs,\textsuperscript{180} all but one were decided on prudential grounds.\textsuperscript{181} Given the sensitivity of foreign relations—and the paramount role that the executive plays here—it makes some sense that the Court has invoked practical reasons to stay its hand. In turn, this makes Justice Breyer’s lone dissent in \textit{Zivotofsky} less idiosyncratic than it may initially seem. Of course, precedent need not be dispositive, and the preceding analysis is admittedly crude. That said, \textit{Zivotofsky} remains the rare foreign relations case where the textualist view prevailed.

Regardless, this Note’s goal is not to argue how \textit{Zivotofsky} should have been decided. Rather, it is to provide a more thorough understanding of the political question doctrine, rooted in actual judicial decision making. In turn, this provides a clearer view of what frameworks \textit{Zivotofsky} rests upon. To complete this picture, the next section discusses what impact \textit{Zivotofsky} has had on the lower courts and whether these courts have adopted the majority’s textualist view.

\section*{C. \textit{Zivotofsky} in the Lower Courts}

Since \textit{Zivotofsky} was decided, two circuit and eight district courts have wrestled with the political question doctrine,\textsuperscript{182} with eight of these cases

\begin{itemize}
\item \textsuperscript{178} Nixon v. United States, 506 U.S. 224 (1993).
\item \textsuperscript{179} Vieth v. Jubelirer, 541 U.S. 267 (2004); United States v. Richardson, 418 U.S. 166 (1974).
\item \textsuperscript{180} Japan Whaling Ass’n, 478 U.S. 221; Goldwater, 444 U.S. 996; Alfred Dunhill of London, Inc., 425 U.S. 682; First Nat’l City Bank, 406 U.S. 759; Banco Nacional de Cuba, 376 U.S. 398.
\item \textsuperscript{181} Goldwater, 444 U.S. 996; Alfred Dunhill of London, Inc., 425 U.S. 682; First Nat’l City Bank, 406 U.S. 759; Banco Nacional de Cuba, 376 U.S. 398.
occurring in the realm of foreign affairs. 183 So far, the majority of these courts have declined to adopt Zivotofsky’s textualist view.

The circuit courts have taken varied approaches. In *Harris v. Kellogg Brown & Root Services*, the Third Circuit considered whether legal action could be taken against military contractors after a soldier’s fatal electrocution in Iraq while showering in his military barracks. 184 In line with Zivotofsky, the court considered the first *Baker* factor, remarking that the other factors would follow if a “textual[] commit[ment]” was present. 185 In *Kerr v. Hickenlooper*, the Tenth Circuit considered whether an amendment to the Colorado constitution requiring voter approval of new taxes violated the Guarantee Clause. 186 The court found the case justiciable. 187 Reviewing *Baker*’s six factors, the majority concluded that none of these cautioned against hearing the case. 188

If Zivotofsky has had an unclear impact in the circuit courts, its effect on the district courts has been even more uncertain. Of the eight cases involving the political question doctrine decided in the lower courts since Zivotofsky, only two of these have acknowledged any potential change in doctrine. 189 All six others have stuck to *Baker*’s hybrid approach.

Even those two courts that have acknowledged Zivotofsky’s potential impact have adopted different standpoints. In *Kaplan v. Central Bank of Islamic Republic of Iran*, the District Court for the District of Columbia considered whether victims and family members of Hezbollah rocket attacks in Israel could demand compensation from Iranian banks that allegedly funded these attacks. 190 The court found this matter justiciable, adopting Zivotofsky’s textualist approach to the political question doctrine. 191 The court then determined the plaintiffs’ cause of action was neither committed to a coordinate branch nor involved judicially unmanageable standards. 192 The Northern District of California in *Center for Biological Diversity*, although also acknowledging Zivotof-

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183. The exceptions here are *Kerr*, 759 F.3d 1186 (dealing with the Guarantee Clause) and In re *Motor Fuel*, 2012 WL 3441578 (dealing with the court’s subject matter jurisdiction). There were too few cases to determine whether the type of case had any impact on the version of the political question doctrine applied.
184. 724 F.3d at 463.
185. *Id.* at 478 (“[T]he remaining political-question factors will be inextricable from this case only if the case presents an issue textually committed to another branch.”).
186. 744 F.3d 1156.
187. *Id.* at 1176.
188. *Id.*
190. 961 F. Supp. 2d 185.
191. See *id.* at 191–94.
192. See *id.* at 193.
sky’s majority approach, was less willing to forego Baker.\textsuperscript{193} According to this court, Zivotofsky made clear that the first two Baker factors were “entitled to the most weight.”\textsuperscript{194} However, the court still considered Baker’s four remaining factors, seemingly unsure of how far Zivotofsky had taken things.\textsuperscript{195}

Because Zivotofsky was decided recently, it is too early to draw any sweeping conclusions from these varied decisions. Perhaps clearest is that, for the most part, the lower courts remain wedded to Baker’s hybrid approach.\textsuperscript{196} Given the Justices’ somewhat mixed signals in Zivotofsky and lower court fears of being overturned, such cautious adherence to Baker should perhaps come as little surprise. Nevertheless, Roberts’s textualist standpoint, as demonstrated by the district court’s approach in Kaplan, has not gone unnoticed. Given the political question doctrine’s many formulations, however, it remains premature to declare any general trend.

D. THE “FUTURE” OF THE POLITICAL QUESTION DOCTRINES

Irrespective of the political question doctrine’s continued interpretation, some scholars suggest something more radical is afoot: that the doctrine itself is ceasing to be. This is because, as various scholars have noted, the Supreme Court has found a decreasing number of cases nonjusticiable for involving a political question.

The doctrine’s disappearance first came to scholarly attention in the aftermath of Bush v. Gore.\textsuperscript{197} Although this case went to the heart of our electoral process, the Court made no mention of a political question. According to Rachel Barkow, this was no coincidence: “The Supreme Court’s failure even to consider the political question doctrine reflects a broader trend in which” the contemporary Court has “overestimate[d] its own powers and prowess vis-à-vis the political branches.”\textsuperscript{198} As Barkow continues, “the Supreme Court has become increasingly blind to its limitations as an institution,” focusing on “Marbury’s grand proclamation of its power without taking that statement in context.”\textsuperscript{199}

Mark Tushnet ascribes this to various influences. First, many Americans have come to accept a strong judiciary ready to wade into the most momentous issues of the day and assert judicial supremacy over these.\textsuperscript{200} From abortion to healthcare to gay marriage, the Justices have become our final arbiters on some

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\textsuperscript{193.} Ctr. For Biological Diversity, 80 F. Supp. 3d 991.  
\textsuperscript{194.} Id. at 1002.  
\textsuperscript{195.} Id. at 1001–05, 1009–11.  
\textsuperscript{196.} This would also suggest that, prior to Zivotofsky, the lower courts had been much truer to Baker’s six factors than the Supreme Court. That said, confirming this requires a much wider study that, although important, would go beyond this Note’s focus on the different variations of the political question doctrine recognized specifically by the Supreme Court.  
\textsuperscript{197.} 531 U.S. 98 (2000).  
\textsuperscript{198.} Barkow, supra note 15, at 300.  
\textsuperscript{199.} Id. at 301.  
\textsuperscript{200.} See Tushnet, supra note 94, at 1234.
of the nation’s fiercest and most protracted social and economic debates. This is encouraged by divided government, fierce political polarization, and the sense that courts are referees when the legislature and executive prove unable to act.201

Finally, and just as importantly, squishy prudential metrics have been replaced by robust constitutional theories like textualism and originalism.202 In the political question context, this means judges need not ask whether they have the expertise to settle a particular issue, but simply whether they are prevented from doing so by constitutional or historical restraints. Zivotofsky provides a microcosm of this. For Chief Justice Roberts, this was an easy case: there were no textual restraints, and the Court could thus move forward. Justice Sotomayor had more difficulty because she acknowledged that prudential factors had some pull. Notwithstanding this, her resolution of the Baker factors cast these as secondary, and—like Roberts—she then found textual factors dispositive. Only Justice Breyer decided on prudential factors and would have stayed the Court’s hand.

Indeed, up until the late 1970s, prudential concerns were far more commonly invoked (if not necessarily dispositive) in majority opinions. From this time onward, however, they have not garnered a majority in a single case.203 In the three most recent cases, the textualist or historical views have triumphed, and prudential accounts—at best—only mentioned in concurrence or dissent.204 Simultaneously, something deeper does seem to be occurring: not only have prudential factors waned, but—as Barkow argues—political questions themselves are increasingly ignored. Indeed, this Note’s survey of Supreme Court cases involving the political question doctrine reveals that the political question doctrine was invoked ten times in the 1960s; fourteen times in the 1970s; eight times in the 1980s; five times in the 1990s; but only once in the 2000s and a single time so far this decade.205 Given this, Barkow may be right that there is an “unmistakable trend... toward a view that all constitutional questions are matters for independent judicial interpretation and that [neither] Congress [nor the Executive] has [any] special institutional advantage” here.206 Thus, instead of taking four competing approaches, perhaps a future Court will abolish political questions altogether.

201. See id.
202. Id. (“[T]oday’s Court has no general constitutional theory that cautions against invalidating statutes.”); see also Richard A. Posner, The Rise and Fall of Judicial Self-Restraint, 100 CALIF. L. REV. 519, 535 (2012).
203. See supra note 177.
205. See supra note 5.
206. See Barkow, supra note 15, at 302.
Regardless of whether Tushnet or Barkow will prove more prescient regarding the political question doctrine’s future (or lack thereof), both accounts rest on a larger background assumption this Note has yet to address. This is that the political question doctrine is more a political or ideological tool than a principled standard. In other words, the Court’s assessment of justiciability depends less on any neutral or consistent metric and more on the majority’s favored outcome, which determines that version of the political question doctrine Justices choose to adopt. 207

The notion that Justices act politically is backed by a great amount of empirical research208 and is almost routinely assumed in the popular press.209 Nor is it difficult to argue the political question doctrine’s specific usage has—at least occasionally—depended more on politics than principle. Justice Brennan, for example, was deeply fearful that states would crush minority voices,210 and it was perhaps not coincidental his Baker factors thus allowed an effective way for federal judges to monitor such legislative actions. Justices Frankfurter and Harlan, far more fearful of judicial overreach,211 embraced a flexible way for courts to avoid the “political thicket.” One could attribute similar motives to those Justices that followed: in particular, the Justices most skeptical of Baker’s hybrid approach (and its attempt to govern states’ conduct) have largely fallen on the conservative end of the spectrum.212

Even if one accepts that politics play a strong role here, one should be careful not to overstate things. First, many issues do not fall neatly on a liberal–conservative axis.213 Second, even if one views law as politics by other means, the Justices are still constrained by—and must give legal justifications for—whatever view of the political question doctrine they choose to adopt. Finally, and most importantly, this Note’s focus has been on judicial decision making rather than ideology. Whereas judicial ideology deals with why Justices decide the way they do (whether based on principle, politics, institutional constraints, 207. See Seidman, supra note 6, at 441–42.
209. See, e.g., Adam Liptak, The Polarized Court, N.Y. TIMES (May 10, 2014), http://www.nytimes. com/2014/05/11/upshot/the-polarized-court.html?_r=0&abt=0002&abg=0 (detailing how Justices’ politics and decision making intersects on the current Court and effectively assuming a direct relationship between these).
210. Cf. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 426 (2010) (detailing Justice Brennan’s concern and focus on protecting minority groups, whether these were racial or economic in nature).
212. For a more detailed description of this trend in the cases of Chief Justice Roberts, Justice O’Connor, and Justice Scalia, see supra pp. 12, 17–18.
213. This is true whether in foreign affairs or political appointment procedure. Also worth noting is that, in Zivotofsky, the more liberal Justices Ginsburg and Kagan joined Roberts’s majority opinion without comment.
etc.), judicial decision making focuses on how.\textsuperscript{214} Lower courts must consider the latter when deciding cases. Furthermore, any understanding of a doctrine’s past, present, and future demands at least starting from this perspective.

\section*{Conclusion}

Regardless of the political question doctrine’s motivations, scholars have long derided the doctrine itself as inconsistently applied and incoherently formulated. By providing a more descriptive account of judicial decision making, this Note has shown that much of the doctrine’s seeming inconsistency and incoherence stems from Justices’ refusal—even after \textit{Baker}—to recognize a single version of it. Rather, over time, the Court has propounded four discrete models, which have varied by issue, era, and jurist. The recent case of \textit{Zivotofsky} provides a prime example of this: the majority embraces one version of the political question doctrine, and the concurrence and dissent two others. Whatever the doctrine’s future, only by recognizing these competing conceptions can one make sense of its past.

\footnote{\textsuperscript{214} In other words, this is the difference between what reasons a Justice explicitly provides and those he or she actually holds. In no way does this Note assume that these are one and the same, but leaves it to more ideologically focused (and statistically sophisticated) studies to reach any conclusions here.}