

The Political Question Doctrine and International Law

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ABSTRACT

Under the political question doctrine, some issues are deemed to be inappropriate for judicial resolution. The modern version of the doctrine is typically traced to the Supreme Court's 1962 decision in Baker v. Carr, in which the Court listed six reasons why an issue might be treated as political. Although the doctrine has received significant scholarly attention, most modern commentary has overlooked the historic relationship between the doctrine and international law. As this Essay documents, the political question doctrine emerged in part to allow the political branches, rather than the courts, to make determinations about this country's—and other countries'—rights and responsibilities under international law. Understanding this historic role of the doctrine sheds light on issues of foreign relations law that are not typically thought to involve political questions: treaty non-self-execution, the later-in-time rule, sovereign immunity, the act of state doctrine, and the domestic status of customary international law. Furthermore, examining the historic relationship between the political question doctrine and international law also helps explain some of the ways in which the lower federal courts apply the doctrine today.

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INTRODUCTION

Under the political question doctrine, some issues are deemed to be inappropriate for judicial resolution. The modern version of the doctrine is typically traced to the Supreme Court’s 1962 decision in *Baker v. Carr*,¹ in which the Court listed six reasons why an issue might be treated as political:

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

Scholars often debate the nature, scope, and legitimacy of the political question doctrine.³

Although the political question doctrine has received significant scholarly attention, most modern commentary has overlooked the historic relationship between the doctrine and international law. As this

¹ 369 U.S. 186 (1962).

² *Id.* at 217 (bracketed numbers added).

³ *See, e.g.*, ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 164 (8th ed. 2021) (“In many ways, the political question doctrine is the most confusing of the justiciability doctrines.”); MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* 176 (2019) (“Perhaps no gatekeeper principle appears—or should appear—more mystifying than the ‘political question’ doctrine.”); Scott Dodson, *Article III and the Political Question Doctrine*, 116 *Nw. U. L. REV.* 681, 687 (2021) (“It is fair to say that the political question doctrine is ill-defined, unsettled, and contentious.”); Richard H. Fallon Jr., *Political Questions and the Ultra Vires Conundrum*, 87 *U. CHI. L. REV.* 1481, 1482 (2020) (“Although such a doctrine indisputably exists, debate abounds concerning its nature and foundations.”).

Essay will explain, the political question doctrine emerged in part to allow the political branches, rather than the courts, to make determinations about this country's—and other countries'—rights and responsibilities under international law. Understanding this historic role of the doctrine sheds light on issues of foreign relations law that are not typically thought today to involve political questions: treaty non-self-execution, the later-in-time rule, sovereign immunity, the act of state doctrine, and the domestic status of customary international law. This history also shows that, contrary to what is often assumed, the way in which the political question doctrine is applied today is often similar to the way in which it was applied before *Baker*.

This Essay is descriptive, not normative. The political question doctrine implicates foundational issues concerning the proper role of the judiciary—issues that were addressed, for example, in the classic debate between Herbert Wechsler and Alexander Bickel over whether the courts should have some discretion to decline to exercise their jurisdiction.⁴ It can reasonably be argued that courts should play a more active role in the foreign affairs area today, including in cases implicating international law, and that the political question doctrine makes it too easy for courts to avoid doing so.⁵ But any assessment of this question should have a sense of the functions that the doctrine has historically served. A longer-term perspective is especially appropriate given that attitudes about judicial review tend to shift periodically, depending on, among other things, the composition of the Supreme Court.

I. PRE-BAKER DECISIONS

Nearly a century ago, Edwin Dickinson—at the time a member of the Board of Editors of the *American Journal of International Law*—published an Editorial Comment in the Journal entitled *International Political Questions in the National Courts*.⁶ He began the Comment with the famous quote from *The Paquete Habana*: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”⁷ He then spent the rest of the Comment qualifying this quote by explaining

⁴ Compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959), with Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47–51 (1961).

⁵ See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 3–6 (1992). But see, e.g., Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 944–45 (2004).

⁶ Edwin D. Dickinson, *International Political Questions in the National Courts*, 19 AM. J. INT'L L. 157, 157 (1925).

⁷ *Id.*; see 175 U.S. 677, 700 (1900).

that “[m]any, if not most, of the international questions which arise in litigation are regarded as political in nature and hence not within the competence of the judicial department at all.”⁸ Thirty years later—after having served as President of the American Society of International Law—Dickinson published a more expansive treatment of the topic in the *University of Pennsylvania Law Review*.⁹

Dickinson was not alone in emphasizing the role of the political question doctrine as a limitation on the domestic application of international law. Quincy Wright made a similar point in his 1922 treatise *The Control of American Foreign Relations*—a book that Louis Henkin cited fifty years later as an important influence on his own foreign relations law treatise. Wright, immediately after observing that courts apply international law as part of the law of the land, has a section in his treatise entitled “This Principle Not Applicable to Political Questions.”¹⁰ As he observed there, when something is a political question, “the courts hold that they must follow the decision of the political organs, irrespective of international law and treaty.”¹¹

The Supreme Court itself highlighted the connection between international law and the political question doctrine in *Baker v. Carr*.¹² In reciting the decisions that illustrated the history of the doctrine, Justice Brennan’s opinion for the Court referred to numerous decisions addressing international law-related issues, including treaty termination, recognition of states, neutrality and belligerency, sovereign immunity, and the duration and cessation of hostilities.¹³

The following categories describe some of the situations before *Baker*, in which the Supreme Court viewed international law-related disputes as presenting political questions.

A. *Discretion Accorded Under International Law*

Some of the nineteenth and early twentieth century political question decisions involved the discretionary authority of the government, especially the executive branch, in foreign affairs. This sort of application

⁸ Dickson, *supra* note 6, at 158.

⁹ See Edwin D. Dickinson, *The Law of Nations as National Law: “Political Questions,”* 104 U. PA. L. REV. 451, 451 (1956).

¹⁰ QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 171–72 (1922); see also EDWARD S. CORWIN, *THE PRESIDENT’S CONTROL OF FOREIGN RELATIONS* 163–67 (1917) (discussing how courts treat certain international law issues as political questions); Melville Fuller Weston, *Political Questions*, 38 HARV. L. REV. 296, 315–16 (1925) (“The rule whereby the courts accept as their guide the decisions of the other two departments upon questions involving international relations is fairly well settled.”).

¹¹ WRIGHT, *supra* note 10, at 172.

¹² 369 U.S. 186 (1962).

¹³ *Id.* at 211–14.

of the political question doctrine is similar to Chief Justice Marshall's dictum in *Marbury v. Madison* asserting that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."¹⁴

A good example of this application is *Charlton v. Kelly*.¹⁵ In that case, the U.S. government was planning to extradite an individual to Italy to be tried for murder, pursuant to an extradition treaty.¹⁶ The individual who was being extradited argued that the treaty was no longer valid because Italy had construed it as not requiring it to extradite its own citizens, which was contrary to the U.S. interpretation of the treaty.¹⁷ The Court rejected this invalidity argument, reasoning that the interpretive dispute merely made the treaty voidable under international law by the United States, and that the executive's decision not to void the treaty was within its discretion.¹⁸ As the Court explained:

[The treaty] was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty at the supreme law of the land and as affording authority for the warrant of extradition.¹⁹

Note the interrelationship here between international law, the political question doctrine, and executive power: because international law made termination of the treaty discretionary under these circumstances, the status of the treaty in U.S. litigation was to be determined by the political branches. That meant that the executive had the power to extradite, at least in the absence of congressional direction to the contrary.

A later extradition decision with similar reasoning is *Terlinden v. Ames*.²⁰ In that case, the petitioner argued that the extradition treaty,

¹⁴ 5 U.S. (1 Cranch) 137, 170 (1803).

¹⁵ 229 U.S. 447 (1913).

¹⁶ *Id.* at 448–49.

¹⁷ *Id.* at 451–54.

¹⁸ *Id.* at 473–76.

¹⁹ *Id.* at 473, 476; *see also* WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 582, at 1007 (1910) (“Whether or not a treaty or other international agreement which the United States may have entered into with a foreign country has been sufficiently ratified by that country is for the political departments of our government to determine, as is also the continuing existence of a treaty.”).

²⁰ 184 U.S. 270 (1902).

which had been made with the Kingdom of Prussia, was no longer operative because of the formation of the German Empire.²¹ Rejecting this argument, the Court explained that “on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance,”²² and it noted that “extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force.”²³ The Court further stated that “whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.”²⁴

By itself, this category of discretion under international law might not reveal much about the application of the political question doctrine to issues implicating more mandatory international law rules. But, as I will discuss, the doctrine was extended broadly to those issues as well.

B. *The Recognition Power*

Some of the early political question decisions gave effect to the position of the political branches about the legitimacy of a foreign government or the scope of its territory. Today, these questions would be viewed as falling within the President’s exclusive recognition power.²⁵ Courts deferred regardless of whether the political branches’ view was consistent with international law norms relating to recognition. In other words, courts were giving absolute deference to political branch determinations of mixed questions of law and fact.

An early decision that made clear that courts would not simply apply the international law of recognition is *Rose v. Himely*.²⁶ In that case, France’s colony on St. Domingo (present-day Haiti) was in revolt, and the issue was whether the Court should consider it independent. The Court rejected the argument that it should simply

²¹ *Id.* at 282.

²² *Id.* at 285.

²³ *Id.*

²⁴ *Id.* at 288; *see also* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (noting that questions concerning “the rights of a part of a foreign empire, which asserts, and is contending for its independence . . . are generally rather political than legal in their character”); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796) (Iredell, J.) (noting that it is not for a domestic court to decide whether a treaty should be voided as a result of a breach).

²⁵ *See* *Zivotofsky v. Kerry*, 576 U.S. 1, 28 (2015) (concluding that “the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone”).

²⁶ 8 U.S. (8 Cranch) 241 (1804).

consult the law of nations on the subject, as articulated by Vattel, reasoning that:

[Vattel] addressed [himself] to sovereigns, not to courts. . . . It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.²⁷

In a subsequent circuit court decision written by Justice Washington, *Clark v. United States*,²⁸ the court reemphasized this point. There, Congress had disallowed trade with colonies and dependencies of France, and the issue was whether St. Domingo qualified.²⁹ The appellants claimed that “neutral nations are bound, by the law which ought to govern nations, to consider St. Domingo as a government separate from, and independent of France,”³⁰ and that “the law of nations, is as much obligatory, as a rule of decision, upon courts, as of conduct on sovereigns.”³¹ But the court said that this argument was precluded by *Rose v. Himely*, which made clear that at least this aspect of the law of nations was not binding on the courts.³²

Another illustration of courts applying the political question doctrine to issues relating to recognition, this time involving deference to the executive branch, is *Jones v. United States*.³³ The issue there was the validity of applying U.S. criminal law to someone who had committed murder on Navassa Island, which the United States had acquired in order to have access to its guano deposits.³⁴ The 1856 Guano Islands Act provided that:

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the

²⁷ *Id.* at 272 (emphasis omitted); see also Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 AM. J. LEGAL HIST. 141, 221 (2013) (“By treating the issue as a non-justiciable political question, the Supreme Court in effect gave Presidents authority to remove recognition decisions from the restraints of the law of nations and to convert them to matters of executive discretion.”).

²⁸ 5 F. Cas. 932 (C.C.D. Pa. 1811) (No. 2838).

²⁹ *Id.*

³⁰ *Id.* at 932–33.

³¹ *Id.* at 933.

³² See *id.*; see also *Kennett v. Chambers*, 55 U.S. 38, 51 (1852) (relying on *Rose* for the proposition that U.S. courts were bound to treat Texas as part of Mexico until the political branches recognized its independence).

³³ 137 U.S. 202, 212–13 (1890).

³⁴ *Id.* at 216.

citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.³⁵

Navassa Island had allegedly been acquired in this manner.³⁶

In response to the defendant's argument that the island was in fact within the lawful jurisdiction of Haiti when acquired, a question of international law, the Court said:

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. . . . [I]f the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.³⁷

Thus, according to the Court, the executive's position in this dispute over territory was binding on the courts regardless of whether Haiti had, or was entitled to have, sovereignty over the island.³⁸ Importantly, when the Court referred to "the fact" of sovereignty, it was referring to a mixed question of law and fact, with the law component being international law.³⁹

C. *Treaty Non-Self-Execution*

Dickinson and others who wrote about the political question doctrine in the 1920s began their analysis by discussing the famous treaty

³⁵ 48 U.S.C. § 1411.

³⁶ For a description of the U.S. acquisition of Navassa Island and the facts of the *Jones* case, see Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2395 (2022).

³⁷ *Jones*, 137 U.S. at 212, 221. For a decision with similar reasoning, see *Williams v. Suffolk Insurance Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (explaining that "when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department").

³⁸ *Jones*, 137 U.S. at 212, 221.

³⁹ *Id.* at 221; see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 662 (2000) (noting that "courts defer to executive branch determinations of such 'facts' even when they conflict with customary international law").

non-self-execution decision, *Foster v. Neilson*.⁴⁰ That decision concerned a treaty with Spain in which Spain conveyed Florida and other territory east of the Mississippi River to the United States.⁴¹ The treaty had a provision that called for giving effect to grants of land previously made by Spain to private parties in this territory, but the Court concluded that this provision was not subject to direct judicial enforcement.⁴² The English language version of the treaty provided that all grants of land made by Spain in the ceded territory prior to the treaty “shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion” of Spain.⁴³ The Court, in an opinion authored by Chief Justice Marshall, reasoned that this provision was in “the language of contract,”⁴⁴ and therefore “address[ed] itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”⁴⁵

Some modern accounts of *Foster* describe it as simply announcing a text-based test for when a treaty is directly judicially enforceable, and they often criticize this test.⁴⁶ They also often note how the Court allegedly reversed itself about whether the treaty provision was self-executing four years later, in *United States v. Percheman*,⁴⁷ after examining the Spanish version of the treaty.⁴⁸

This account of *Foster* is misleading, in large part because it overlooks what earlier writers saw, which was the Court’s reliance on political question reasoning. Before concluding the treaty with Spain, the U.S. government had taken the position that Spain had already ceded the area encompassing the tract at issue in the case to France in 1800, and that France had conveyed it to the United States in 1803 as part of the Louisiana Purchase. This view, moreover, was reflected in several federal statutes enacted prior to the treaty.⁴⁹ Against that backdrop, the Supreme Court concluded that “the legislature must execute

⁴⁰ 27 U.S. 253 (1829); Dickinson, *supra* note 6, at 159.

⁴¹ *Foster*, 27 U.S. at 254.

⁴² *Id.* at 314–15.

⁴³ *Id.* at 274.

⁴⁴ *Id.* at 254.

⁴⁵ *Id.* at 314.

⁴⁶ See, e.g., Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 645 (2008).

⁴⁷ 32 U.S. (7 Pet.) 51 (1833).

⁴⁸ See Vázquez, *supra* note 46, at 628 (contending that “[t]he Court overruled *Foster* in *United States v. Percheman*”); Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 59 (2012) (describing *Percheman* as a case in which “the Court came to the opposite conclusion regarding the same set of facts”).

⁴⁹ For additional discussion of this aspect of the decision, see Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 160–62.

the contract before it can become a rule for the Court,”⁵⁰ and that, in the meantime, the Court was “not at liberty to disregard the existing laws on the subject.”⁵¹ Because the treaty provision was not self-executing, explained the Court, it could not “give validity to those [grants] not otherwise valid.”⁵²

In other words, a key reason that the Court in *Foster* declined to apply the treaty provision in question was that doing so would require contradicting the U.S. political branches in a territorial dispute with another nation. Although the dispute implicated international legal questions, concerning the scope of both the earlier treaty with France and the current one with Spain, the Court thought these questions should not be resolved by domestic courts. The Court elaborated on this point at length:

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights; and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. . . . A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.⁵³

Although it is true that the Court in *Percheman* subsequently concluded that the language in the treaty could be directly applied, that was in a case involving land grants in territory that indisputably had been owned by Spain prior to the treaty.⁵⁴ Importantly, the Court emphasized that distinction in a decision issued after *Percheman*, in which it once again refused to give effect to Spanish land grants in the disputed territory. The Court explained:

[The *Percheman* decision] was in relation to a grant of land in Florida, which unquestionably belonged to Spain at the time the grant was made; and where the Spanish authorities had an

⁵⁰ *Foster*, 27 U.S. at 314.

⁵¹ *Id.* at 254.

⁵² *Id.* at 314.

⁵³ *Id.* at 253, 309.

⁵⁴ *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86 (1833).

undoubted right to grant, until the treaty of cession in 1819. It is of such grants that the Court speak, when they declare them to be confirmed and protected by the true construction of the treaty; and that they do not need the aid of an act of congress to ratify and confirm the title of the purchaser. But they do not, in any part of the last mentioned case, apply this principle to grants made by Spain within the [disputed territory].⁵⁵

As Dickinson observed, *Foster* stands for the proposition that “[i]f the political departments of government dispute a boundary with a foreign nation, the courts must bring their decisions into harmony with the position thus asserted.”⁵⁶ The Supreme Court in *Baker* similarly cited *Foster* as an example of how “the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory.”⁵⁷

D. *The Later-in-Time Rule*

Early writers, and the Court in *Baker*, also connected the later-in-time rule to the political question doctrine. Under the later-in-time rule, courts will apply federal statutes even if they conflict with an earlier treaty. Most modern accounts of this doctrine simply treat it a species of congressional power—namely, the power to breach international obligations. The power is softened by the *Charming Betsy* canon, pursuant

⁵⁵ *Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 519 (1838). Carlos Vázquez suggests that this line of cases concerned merely an alternative holding in *Foster*, pursuant to which, he contends, the Court interpreted the treaty not to apply to the disputed territory. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 702 n.35 (1995); Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INTERNATIONAL LAW STORIES 151, 163 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007). In fact, the Court in *Foster* expressly abstained from interpreting the treaty, noting that “[h]owever individual judges might construe the treaty,” the Court was bound to align its decision with the views of the political branches. 27 U.S. at 253. Moreover, the Court’s abstention on that question seems clearly to have affected its non-self-execution analysis; it emphasized, for example, that it should not apply the treaty in the absence of implementing legislation because “the Court is not at liberty to disregard the existing laws on the subject.” *Id.* at 315. For additional discussion of these points, see Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 370–75 (1992); David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. 32, 36–40 (2009); DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY 70 (2016) (noting the political question holding in *Foster*).

⁵⁶ Dickinson, *supra* note 6, at 158–59.

⁵⁷ *Baker v. Carr*, 369 U.S. 186, 212 (1962); see also SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 364–65 (2d ed. 1916) (“[A]lthough a treaty operates by its own force as municipal law binding on the courts equally with an act of the legislature, the courts will follow the determinations of the political departments of the government, the executive and legislative, in questions involving primarily the external operation of the treaty as an international compact.”).

to which ambiguous statutes, are construed, where possible, not to violate international law.⁵⁸

This account, however, misses something that earlier writers saw, which is that the later-in-time rule allows courts to avoid taking a position on the international law question altogether. In a decision subsequently endorsed by the Supreme Court, Justice Benjamin Curtis, sitting as Circuit Justice, explained the basis for giving effect to later-in-time statutes when there is an arguable conflict with an earlier treaty:

[I]t is wholly immaterial to inquire whether they have, by the act in question, departed from the treaty or not; or if they have, whether such departure were accidental or designed, and if the latter, whether the reasons therefor were good or bad. If by the act in question they have not departed from the treaty, the plaintiff has no case. If they have, their act is the municipal law of the country, and any complaint, either by the citizen, or the foreigner, must be made to those, who alone are empowered by the constitution, to judge of its grounds, and act as may be suitable and just.⁵⁹

Thus, the later-in-time rule is partly a rule of *judicial avoidance* of international law disputes. The Supreme Court endorsed this idea in *Whitney v. Robertson*,⁶⁰ citing Justice Curtis's decision with approval and observing that:

[As] he justly observed, . . . if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.⁶¹

E. *Sovereign Immunity*

Starting in the late 1930s until the enactment of the Foreign Sovereign Immunities Act ("FSIA") in 1976, the Supreme Court began giving absolute deference to the position of the executive branch about

⁵⁸ See RESTATEMENT OF THE LAW (FOURTH), FOREIGN RELATIONS LAW OF THE UNITED STATES § 309(1) (AM. L. INST. 2018) ("Where fairly possible, courts in the United States will construe federal statutes to avoid a conflict with a treaty provision."); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (noting that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

⁵⁹ *Taylor v. Morton*, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799).

⁶⁰ 124 U.S. 190 (1888).

⁶¹ *Id.* at 195; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) ("The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts.").

whether to accord foreign governments and their instrumentalities sovereign immunity when they were sued. As Louis Henkin noted, under these decisions, “if the Executive announced a national policy in regard to immunity generally, or for the particular case, that policy was law for the courts and binding upon them, *regardless of what international law might say about it*.”⁶² Some commentators specifically complained that the courts in these cases were abdicating their role of deciding relevant questions of international law.⁶³

Although forgotten by most foreign relations law scholars today, the Supreme Court in *Baker* referred to these decisions as examples of the political question doctrine.⁶⁴ In fact, the reasoning of these decisions appears to have been directly incorporated into the *Baker v. Carr* factors. These factors include, for example, “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government” and “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”⁶⁵ Compare those factors to the reasoning from one of the sovereign immunity decisions, *Mexico v. Hoffman*:

[I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. . . . It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.⁶⁶

This reasoning is similar to that for the later-in-time doctrine: the Supreme Court is in effect saying that either the executive branch position is supported by the customary international law of sovereign immunity or that the position has superseded that international law for purposes of U.S. law, and that the courts *need not take a position on that question*.⁶⁷ Effectively, of course, this means that the courts were

⁶² LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 56 (2d ed. 1996) (emphasis added).

⁶³ See, e.g., Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT’L L. 168 (1946). Jessup acknowledged that some foreign affairs issues are properly treated as political questions, but he objected to such treatment for international law issues relating to sovereign immunity. *Id.* at 168–69. In his 1956 article, Dickinson similarly complained about the sovereign immunity decisions. See Dickinson, *supra* note 9, at 466–67.

⁶⁴ See *Baker v. Carr*, 369 U.S. 186, 213 (1961) (first citing *Ex parte Peru*, 138 U.S. 578 (1943); and then citing *Mexico v. Hoffman*, 324 U.S. 30, 34–35 (1945)).

⁶⁵ *Id.* at 217.

⁶⁶ 324 U.S. 30, 35 (1945).

⁶⁷ Even the early sovereign immunity decision, *Schooner Exchange v. McFaddon*, can be viewed in political question terms: the Court reasoned that the political branches had not altered the presumption that foreign government vessels are immune from seizure and thus had not

allowing the executive branch to develop the law in these cases, at least in the absence of any statutory law to the contrary.

F. *The Act of State Doctrine*

The act of state doctrine was once closely linked with sovereign immunity, and both were viewed as being connected to the political question doctrine. Like sovereign immunity, the act of state doctrine was, in part, a doctrine of international law avoidance. A good example of this role is the Court's decision in *Oetjen v. Central Leather Co.*⁶⁸ In that case, the commander of revolutionary forces in Mexico seized a large number of leather hides during the civil war.⁶⁹ The original owner of the hides sued the company that acquired them from the commander, in a New Jersey state court, alleging that the hides had been seized in violation of international law.⁷⁰ In the meantime, the United States had recognized the revolutionary government.⁷¹ The Court expressed doubts about the strength of the plaintiff's international law arguments.⁷² But it said that it did not matter because

[i]t is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to reexamination by this or any other American court.⁷³

The Court in *Oetjen* also stated more broadly that “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”⁷⁴ This political question concept was relevant, the Court explained, because the case concerned “the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to reexamination and modification by the courts of

“imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.”
11 U.S. (7 Cranch) 116, 146 (1812).

⁶⁸ 246 U.S. 297 (1918).

⁶⁹ *Id.* at 300–01.

⁷⁰ *Id.* at 301.

⁷¹ *Id.* at 297.

⁷² *Id.* at 304.

⁷³ *Id.*

⁷⁴ *Id.* at 302.

this country.”⁷⁵ The Court proceeded to cite a string of political question decisions in support of this conclusion.⁷⁶ Not surprisingly, the Court in *Baker* cited and quoted from *Oetjen*, while also making clear that not *all* foreign relations law questions are political.⁷⁷

G. Domestic Status of Customary International Law

The political question doctrine was also relevant to the domestic status of customary international law, a topic that has long been the subject of academic debate. Unlike treaties, the Constitution does not list customary international law, historically referred to as part of the “law of nations,” as part of the supreme law of the land.⁷⁸ Most scholars now agree that, before *Erie Railroad Co. v. Tompkins*, courts treated customary international law as a form of general common law—that is, as a source of law that was neither federal law nor state law.⁷⁹ But there is substantial disagreement about its post-*Erie* status.

The most famous pre-*Erie* decision applying customary international law is *The Paquete Habana*.⁸⁰ In that case, the U.S. Navy had seized fishing vessels off the coast of Cuba during the Spanish-American War, and the question was whether these were legitimate prizes of war.⁸¹ The Supreme Court held in a 6–3 decision that they were not, concluding that a customary international rule had developed disallowing the seizure of unarmed coastal fishing vessels.⁸²

In its analysis, the Court in *The Paquete Habana* referred to international law as “part of our law.”⁸³ Importantly, though, the Court qualified this statement by suggesting that this was true only “where there is no treaty, and no controlling executive or legislative act or

⁷⁵ *Id.* at 303; *see also* *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 308–09 (1918) (noting that the executive’s recognition of a revolutionary Mexican government “binds the judges as well as all other officers and citizens of the Government” and that “the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory”).

⁷⁶ *Ricaud*, 246 U.S. at 302.

⁷⁷ *See Baker v. Carr*, 369 U.S. 186, 211 n.31 (1962). As explained in the next Part, the Supreme Court has shifted the act of state doctrine away from the political question doctrine since that decision, although there are still important affinities between the two doctrines. *See infra* Part III.

⁷⁸ The only reference to the law of nations in the Constitution is a grant of authority to Congress to “define and punish . . . Offences against the Law of Nations.” U.S. CONST. art. I, § 8.

⁷⁹ *See* Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641, 1671 (2017) (“It is non-controversial that, prior to the ‘avulsive’ changes produced by *Erie Railroad v. Tompkins*, customary international law was ‘general common law’—which was neither state nor federal in character.”).

⁸⁰ 175 U.S. 677 (1900).

⁸¹ *Id.* at 678–79.

⁸² *See id.* at 715.

⁸³ *Id.* at 700.

judicial decision.”⁸⁴ The Court’s qualification is consistent with the historic role of the political question doctrine, pursuant to which the courts sought to ensure congressional and presidential control over international law. In that case, political branch control was preserved because neither the President nor the Secretary of the Navy had ordered the seizure of the vessels in question and the President had affirmatively directed the navy to follow the law of nations in the conflict.⁸⁵ Importantly, Congress had also specifically authorized the federal courts to adjudicate prize disputes—and for the Supreme Court to hear appeals in these cases—a role that inherently requires adjudication of questions of international law.⁸⁶

II. POST-*BAKER* DECISIONS

This Part provides examples of post-*Baker* decisions in the same categories discussed above. These decisions are primarily lower court decisions rather than decisions by the Supreme Court. The Supreme Court has applied the political question doctrine as a basis for dismissal in only three majority decisions since *Baker*, none of which has involved foreign affairs.⁸⁷ By contrast, the lower courts regularly apply the doctrine, especially in the foreign affairs context. Most of the life of the

⁸⁴ *Id.*

⁸⁵ *See id.* at 712 (“The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.”); *see also* Born, *supra* note 78, at 1697 (“The [*Paquete Habana*] decision confirmed the authority of U.S. courts to apply rules of international law directly, but only when Congress and the President had so directed.”). David Golove has argued that the Court in *The Paquete Habana* was merely saying that the law of nations could be applied *even in the absence of* controlling political branch acts, not that such acts could displace judicial application of the law of nations. *See* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT’L L. & POL’Y 363, 391–92 (2003). But that reading does not make sense in context, given that, as the Court noted, there were controlling executive acts there supporting the application of the law of nations. Nor is it how the dissent interpreted what the majority was saying. *See The Paquete Habana*, 175 U.S. at 716 (Fuller, C.J., dissenting) (construing the majority’s analysis as considering whether the law of nations exemption from seizure should be applied when “such captures were not in terms directed”).

⁸⁶ *See The Paquete Habana*, 175 U.S. at 679–86, 714 (discussing Congress’s conferral of prize jurisdiction and noting that the Court was “sitting as the highest prize court of the United States” and was in that role “administering the law of nations”).

⁸⁷ *See generally* Gilligan v. Morgan, 413 U.S. 1 (1973) (military training and judicial surveillance); Nixon v. United States, 506 U.S. 224 (1993) (impeachments); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (partisan gerrymandering). A plurality of the Court would have applied the doctrine in *Goldwater v. Carter*, which involved a constitutional dispute over the President’s authority to terminate a treaty. 444 U.S. 996 (1979).

political question doctrine during the last sixty years has been in the lower courts.⁸⁸

As this Part shows, an important strand of the lower court practice is similar to the pre-*Baker* Supreme Court decisions, in that the courts use the political question and related doctrines to ensure political branch control over international law. To be sure, some of the labels have changed, but the vestiges of the older approach are still evident. This is not to suggest there is complete continuity with the past; some modern decisions involve abstention on constitutional separation of powers issues, which was not true of the older cases.⁸⁹ But, contrary to what is often assumed, most modern political question decisions do not involve constitutional issues.⁹⁰

A. Discretion Accorded Under International Law

Like the older cases, modern courts refuse to second guess the exercise of political branch discretion that is allowed under international law. In *Meza v. U.S. Attorney General*,⁹¹ for example, an individual being extradited to Honduras challenged the validity of the extradition treaty with Honduras, arguing that a post-coup government was not a legitimate successor state under international law and thus could not invoke the treaty. In rejecting this argument, the court, citing the Supreme Court's 1902 decision in *Terlinden v. Ames*, said that it "must

⁸⁸ See Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 *STAN. L. REV.* 1031 (2023). As discussed in that article, because of its discretionary docket and greater political authority, the modern Supreme Court may have less need than the lower federal courts for the political question doctrine. *But cf. Rucho*, 139 S. Ct. at 2489 (holding that a constitutional challenge to partisan gerrymandering presented a political question because of the lack of judicially manageable standards).

⁸⁹ See, e.g., *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001) (constitutionality of congressional-executive agreement); *Doe I v. Bush*, 257 F. Supp. 2d 436, 438 (D. Mass. 2003) (constitutionality of use of military force); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (constitutionality of treaty termination).

⁹⁰ See Bradley & Posner, *supra* note 87, at 1052–53 (documenting how a majority of the post-*Baker* lower court political question decisions involve only nonconstitutional claims). This is contrary to what many commentators have assumed, in part because they have focused mainly on just the Supreme Court. See, e.g., CHEMERINSKY, *supra* note 3, at 164 (discussing the political question doctrine only with respect to constitutional claims); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 *DUKE L.J.* 1457, 1461 (2005) (defining political questions only in terms of constitutional issues); Fallon, *supra* note 3, at 1495 ("Most modern political question disputes have turned on whether the Constitution entrusts the resolution of constitutional questions to an institution other than the judiciary, typically through a textually demonstrable commitment of decision-making authority."); Martin H. Redish, *Judicial Review and the "Political Question"*, 79 *Nw. U. L. REV.* 1031, 1031 (1985) ("The so-called 'political question' doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution.").

⁹¹ 693 F.3d 1350 (11th Cir. 2012).

defer to the determination of the executive branch that the treaty between Honduras and the United States remains in force.”⁹²

Of similar effect is *Arias v. Warden*.⁹³ In that case, Colombia was seeking the extradition of someone who had fled to the United States. He argued that the extradition treaty between the two countries was no longer in effect as a result of a Colombian Supreme Court decision that had nullified the domestic legislation that had ratified the treaty.⁹⁴ The court responded by stating that “our Executive Branch—not [the petitioner-appellant] and not this Court—gets to decide what impact, if any, the Colombian court’s ruling had on the treaty’s status as between the parties.”⁹⁵ The court made clear that it was “deferring to the Executive’s judgment on a *political issue*—that is, treaty recognition.”⁹⁶

B. *The Recognition Power*

As in the pre-*Baker* cases, courts continue to treat issues relating to the recognition of foreign governments and their territories as falling outside of judicial review, even when they implicate questions of international law. An example is *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*.⁹⁷ In that case, landlords were seeking to recover unpaid rent from the successor states that emerged from the dissolution of Yugoslavia. In concluding that the suit was barred by the political question doctrine, the court reasoned that the obligation of a successor state with respect to Yugoslavia’s property “is precisely the type of determination that is reserved to the Executive in the first instance, and which has yet to be made.”⁹⁸ The court acknowledged that “principles of equity and international comity suggest some equitable assumption of a predecessor state debt,” but the court observed that “the federal courts do not have the authority or the means to determine the equitable distribution of the public debt of a foreign state among several successor states.”⁹⁹

⁹² *Id.* at 1358 (citing *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) in the next sentence for support).

⁹³ 928 F.3d 1281 (11th Cir. 2019).

⁹⁴ *See id.* at 1283.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1289; *see also, e.g.*, *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (“Is it the province of a court in the United States to decide whether Korea’s or Japan’s reading of the treaty between them is correct, when the Executive has determined that choosing between the interests of two foreign states in order to adjudicate a private claim against one of them would adversely affect the foreign relations of the United States? Decidedly not.”).

⁹⁷ 218 F.3d 152 (2d Cir. 2000).

⁹⁸ *Id.* at 161.

⁹⁹ *Id.*

Another example is *Mingtai Fire & Marine Insurance Co. v. United Parcel Service*.¹⁰⁰ The issue there was whether a treaty concerning international transportation of goods applied to a shipment to Taiwan, given that mainland China was a party to the treaty but Taiwan was not. The court explained that “whether China is the sovereign, *de jure* or *de facto*, of the territory of Taiwan is a political question.”¹⁰¹ As a result, the court “look[ed] to the statements and actions of the ‘political departments’ in order to answer whether, following [U.S.] recognition of China and derecognition of Taiwan, China’s adherence to the [treaty] binds Taiwan.”¹⁰² The court concluded that the treaty did not apply, while also emphasizing that “we do not independently determine the status of Taiwan; instead, we merely recognize and defer to the political departments’ position.”¹⁰³

C. Treaty Non-Self-Execution

Although modern courts tend to use the label of non-self-execution when declining to give domestic legal effect to treaties rather than the political question label, some courts have specifically noted the connection between the two concepts. Consider, for example, *Republic of the Marshall Islands v. United States*.¹⁰⁴ The plaintiff there was seeking a ruling that the United States had breached its obligation under the Non-Proliferation Treaty to pursue “negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”¹⁰⁵ The court concluded that the dispute was not appropriate for judicial resolution, noting:

Whether examined under the rubric of treaty self-execution, the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch.¹⁰⁶

This conception of the treaty self-execution doctrine also helps explain why, as both the *Restatement Third* and *Restatement Fourth of Foreign Relations Law* concluded, the determination of whether a treaty is self-executing is based on the intent or understandings of the

¹⁰⁰ 177 F.3d 1142 (9th Cir. 1999).

¹⁰¹ *Id.* at 1145.

¹⁰² *Id.*

¹⁰³ *Id.* at 1147.

¹⁰⁴ 865 F.3d 1187 (9th Cir. 2017).

¹⁰⁵ *Id.* at 1191.

¹⁰⁶ *Id.* at 1192.

U.S. treaty-makers rather than that of all the parties to a treaty.¹⁰⁷ If the President and Senate intend to make a treaty self-executing, they have rendered its enforcement appropriate for judicial resolution; otherwise, it is appropriate only for political branch resolution.

This overlap with the political question doctrine also helps explain why courts give absolute deference to the Senate in its non-self-execution declarations. When approving treaties, the Senate sometimes declares that the provisions of the treaty are not self-executing.¹⁰⁸ The lower courts have uniformly given effect to these declarations.¹⁰⁹ In effect, the courts have construed the Supremacy Clause of the Constitution as *allowing* the political branches to give direct effect to international law, but not *requiring* that they do so. Whether to give the treaties this effect is, in other words, a political decision.¹¹⁰

Furthermore, even for self-executing treaties, courts give “great weight” to executive branch interpretations.¹¹¹ The basic rationale is that the executive branch has more expertise and information than the courts concerning the issue and has a better understanding of the likely consequences of adopting one interpretation over another. Such deference is, in effect, just a softer form of the political question doctrine, used for situations in which a treaty is unclear.¹¹² Whether the executive branch’s interpretation in such situations is correct from the standpoint of international law is not something that the courts decide.

D. *The Later-in-Time Rule*

As discussed in Part I, the later-in-time rule developed in part as an international law avoidance tool.¹¹³ By giving effect to clear

¹⁰⁷ See RESTATEMENT OF THE LAW (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (AM. L. INST. 1987); RESTATEMENT (FOURTH), *supra* note 58, § 310(2); *see also* *Medellin v. Texas*, 552 U.S. 491, 519 (2008) (“[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”).

¹⁰⁸ See CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 53–54 (3d ed. 2021); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 419–22 (2000).

¹⁰⁹ See, e.g., *Renkel v. United States*, 456 F.3d 640, 644 (6th Cir. 2006) (collecting authorities).

¹¹⁰ For a defense of this perspective, see Bradley, *supra* note 49; *see also* RESTATEMENT (FOURTH), *supra* note 58, § 310(2)(b) (“If the Senate’s resolution of advice and consent specifies that a treaty provision is self-executing or non-self-executing, courts will defer to this specification.”).

¹¹¹ See, e.g., *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1512 (2017); *Abbott v. Abbott*, 560 U.S. 1, 15 (2010); *Medellin v. Texas*, 552 U.S. 491, 513 (2008).

¹¹² Cf. Bradley, *supra* note 39, at 651 (“‘Deference’ in foreign affairs cases can mean a variety of propositions, ranging from the weight given to an argument based on its persuasive power, to acceptance of the executive branch’s views of international facts, to judicial abstention under the political question doctrine.”).

¹¹³ See *supra* Part I.

expressions of legislative intent, the courts did not necessarily have to decide whether that placed the United States in breach of its international obligations. This approach preserved space for the political branches to argue that, in fact, the legislation was not in breach.¹¹⁴

The same holds true today. As the *Restatement (Fourth) of Foreign Relations Law* explains, the later-in-time rule gives effect to the “latest expression of the will of the U.S. political branches.”¹¹⁵ And, when that expression is in the form of a clearly worded statute, courts need not resolve whether the statute is consistent with a treaty obligation.¹¹⁶ A number of post-*Baker* decisions have expressly noted this abstention attribute of the doctrine.¹¹⁷

The *Charming Betsy* canon is consistent with this point. Although applications of the canon require courts to consider the content of international law when interpreting statutes, the underlying aim can be understood as preserving political branch control over whether and how the United States violates international law.¹¹⁸ In any event, whether a statute violates international law will itself often be uncertain, and if the statute is clear, courts are not required to resolve that issue: they simply apply the statute.

E. Sovereign Immunity

Although the sovereign immunity regime described in Part I was displaced in 1976 by the FSIA, a vestige of it has continued with respect to the immunity of individual foreign officials, especially current and former heads of state.

In a 2010 decision, *Samantar v. Yousuf*,¹¹⁹ the Supreme Court held that the FSIA did not apply to suits against individual foreign officials.¹²⁰ The Court did not deny that these officials might be entitled to immunity, but it indicated that any such immunity would come from the

¹¹⁴ See *supra* notes 58–60 and accompanying text.

¹¹⁵ RESTATEMENT (FOURTH), *supra* note 58, § 309(2).

¹¹⁶ *Id.* § 309(3).

¹¹⁷ See, e.g., *Kappus v. Comm’r of Internal Revenue*, 337 F.3d 1053, 1056 (D.C. Cir. 2003) (“The question of whether the Treaty and statute can be harmonized as the government suggests is an extremely close one. It is not, however, a question that we need resolve.”); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (“Our conclusion, of course, speaks not at all to whether the United States has upheld its treaty obligations under international law.”); *S. Afr. Airways v. Dole*, 817 F.2d 119, 126 (D.C. Cir. 1987) (applying provision in anti-apartheid legislation without resolving whether it violated an air services agreement with South Africa).

¹¹⁸ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 526 (1998).

¹¹⁹ 560 U.S. 305 (2010).

¹²⁰ *Id.* at 308.

common law rather than statute. Since then, the lower courts have been tasked with developing this common law of immunity.¹²¹

Foreign official immunity is regulated by customary international law, although the precise content of this body of law is heavily contested. The Supreme Court in *Samantar* did not say much about this body of international law. Instead, the Court merely observed in a footnote that “we need not determine whether declining to afford immunity to petitioner would be consistent with international law.”¹²²

Since *Samantar*, the lower courts have not attempted to discern, let alone apply, the customary international law of foreign official immunity. Many of them have simply deferred to the views of the executive branch about whether to confer immunity in particular cases, similar to what courts did before the FSIA with respect to governmental immunity.¹²³ In other cases, they have attempted to glean “State Department policy.”¹²⁴ These decisions do not typically use the political question label, but the effect is the same.

F. *The Act of State Doctrine*

Two years after *Baker*, the Court in *Banco Nacional de Cuba v. Sabbatino* put some daylight between the act of state doctrine and the political question doctrine, reasoning:

Despite the broad statement in *Oetjen* that “The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments,” it cannot of course be thought that “every case or controversy which touches foreign relations lies beyond judicial cognizance.” The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.¹²⁵

¹²¹ See Curtis A. Bradley, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity*, 115 AM. J. INT’L L. 1 (2021).

¹²² *Samantar*, 560 U.S. at 320–21 & n.14.

¹²³ See, e.g., *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013); *Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012); see also *Samantar*, 560 U.S. at 323 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”). *But cf.* *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (accepting absolute deference for the immunity of heads of state but not for the immunity of other foreign officials).

¹²⁴ See, e.g., *Broidy Cap. Mgmt. LLC v. Muzin*, 12 F.4th 789, 798 (D.C. Cir. 2021); *Doe 1 v. Buratai*, 318 F. Supp. 3d 218, 230 (D.D.C. 2018); see also *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (concluding that common law principles of immunity include deference to the executive branch’s position).

¹²⁵ 376 U.S. 398, 423 (1964) (citations omitted).

Years later, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,¹²⁶ the Court further disavowed a prudential, abstention-oriented approach to applying the act of state doctrine, contrary to what the executive branch had suggested in that case.¹²⁷

But the Court has retained a key strand of the original foundation of the act of state doctrine, which is a concern about contradicting the political branches in their conduct of foreign affairs. As the Court noted in *Sabbatino*,

The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.¹²⁸

Consistent with that idea, the Court applied the doctrine in that case to avoid addressing questions of international law, prompting Justice White to remark in his dissent that he was “dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases.”¹²⁹ By contrast, the majority in *Sabbatino* believed—like Chief Justice Marshall in *Foster v. Neilson*—that it was not the Court's role to act as an international tribunal, a role that it suggested was unlikely to be accepted by other countries.¹³⁰

The act of state doctrine therefore continues to be related to the political question doctrine, even if not a direct application of it.¹³¹

¹²⁶ 493 U.S. 400 (1990).

¹²⁷ *Id.* at 409–10.

¹²⁸ 376 U.S. at 423.

¹²⁹ *Id.* at 439 (White, J., dissenting).

¹³⁰ *See id.* at 434–35 (rejecting “the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies”).

¹³¹ The *Restatement (Third) of Foreign Relations Law* observed that the act of state doctrine “reflects deference to the Executive Branch, *akin to the political question doctrine.*” RESTATEMENT (THIRD), *supra* note 106, § 443 cmt. a (emphasis added). The *Restatement (Fourth)* describes it more narrowly as “a special choice-of-law rule,” although it notes that the rule “rests on the U.S. constitutional separation of powers and in particular on the proper distribution of functions between the judicial and political branches of government.” RESTATEMENT (FOURTH), *supra* note 58, § 441 cmt. a; *see also* 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.2.1 (3d ed. 1984) (observing that the “[a]ct-of-state doctrine is at least a close cousin of political-question doctrine, given the clear emphasis on separation-of-powers concerns”); Choper, *supra* note 89, at 1499 (noting that the act of state doctrine “resembles the political question doctrine in that its premise is that there are some subjects that judges are less competent to examine than are the political branches”).

Courts under certain circumstances decline to declare invalid acts of foreign governments, even when those acts are alleged to be contrary to international law, in order to avoid interfering with political branch management of U.S. foreign relations. Some lower courts have specifically taken note of the overlap between the doctrines.¹³²

G. *Domestic Status of Customary International Law*

Some scholars have claimed that, since *Erie*, customary international law has the status of self-executing federal common law.¹³³ Courts, however, have not endorsed this proposition. Instead, they have waited for political branch authorization before applying customary international law. In fact, in the more than 230 years of U.S. constitutional history, it is difficult to find even a single decision, even in the lower courts, applying customary international law as federal law.¹³⁴

There are some situations, however, in which the political branches have directed the courts to consider customary international law. The federal piracy statute, which dates back to 1819, criminalizes “the crime of piracy as defined by the law of nations”¹³⁵ In applying this statute, courts necessarily have had to look to and interpret customary international law.¹³⁶ The FSIA allows for suits against foreign governments

¹³² See, e.g., *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 954 (5th Cir. 2011) (“[M]any of these arguments [for application of the act of state doctrine] coincide with those that have animated our decision on political question grounds.”); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983) (“The act of state doctrine is essentially the foreign counterpart to the political question doctrine. Both doctrines require courts to defer to the executive or legislative branches of government when those branches are better equipped to handle a politically sensitive issue.”); see also *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787–88 (1972) (Brennan, J., dissenting) (“*Sabbatino* held that the validity of a foreign act of state in certain circumstances is a ‘political question’ not cognizable in our courts.”).

¹³³ See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 (1998); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984). For a critique of this claim, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997); see also, e.g., Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT’L L. 513, 519 (2002) (“[T]he fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law.”).

¹³⁴ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law’s Domestic Status: Reflections After Twenty-Five Years*, TRANSNAT’L LITIG. BLOG (Apr. 4, 2022), <https://tlblog.org/customary-international-laws-domestic-status-reflections-after-twenty-five-years/> [https://perma.cc/DT8J-X2S3].

¹³⁵ 18 U.S.C. § 1651.

¹³⁶ For a decision holding that courts should consult the customary international law standards relating to piracy as they exist today rather than when the statute was first enacted, see *United States v. Dire*, 680 F.3d 446, 467–68 (4th Cir. 2012).

for “rights in property taken in violation of international law,”¹³⁷ necessitating judicial consideration of the relevant customary international law standards. Another, more complicated example is the Alien Tort Statute (“ATS”), which, since 1789, has given the federal district courts jurisdiction to hear suits by aliens for torts “committed in violation of the law of nations.”¹³⁸ Congress has also specifically codified certain civil and criminal offenses against international law.¹³⁹

In the absence of such authorizations, however, modern courts have not typically applied customary international law as domestic law. When executive branch actions—in the immigration area, for example—have been challenged under customary international law, courts have cited the “controlling executive act[s]” statement in *The Paquete Habana* as a reason for rejecting the claims.¹⁴⁰

Courts have also declined to rely on customary international law to preempt inconsistent state law, even though such preemption would seem to follow as a matter of course if customary international law had the status of federal common law. A good illustration is *Buell v. Mitchell*.¹⁴¹ There, the issue was whether customary international law preempted Ohio’s death penalty statute.¹⁴² The court first concluded that customary international law did not currently prohibit the death penalty. But even if it did, reasoned the court, it would not provide a basis for preemption:

[W]here customary international law is being used as a defense against an otherwise constitutional action, the reaction to any

¹³⁷ 28 U.S.C. § 1605(a)(3). The Supreme Court has held that this provision refers to the traditional international law of expropriation and thus applies only to the taking of property of foreign citizens, not a country’s own citizens. *Fed. Republic of Ger. v. Philipp*, 141 S. Ct. 703, 704 (2021). The Court noted, among other things, that a broader reading “would circumvent the reticulated boundaries Congress placed in the FSIA with regard to human rights violations.” *Id.* at 713.

¹³⁸ 28 U.S.C. § 1350. The ATS was part of the First Judiciary Act, which regulated the structure and jurisdiction of the new federal court system. The only other place in the Act where the law of nations is mentioned is in a section addressing the Supreme Court’s original jurisdiction, which provided that the Court “shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations.” This provision appears to have authorized the Court to consider international law concerning diplomatic immunity when exercising its jurisdiction. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80. This language continued in the U.S. Code until 1978, when it was eliminated by the Diplomatic Relations Act, which took account of the fact that the United States had become a party to a treaty on the subject—the Vienna Convention on Diplomatic Relations.

¹³⁹ *See, e.g.*, Torture Victim Protection Act of 1991, 28 U.S.C. § 1350; War Crimes Act of 1996, 18 U.S.C. § 2441.

¹⁴⁰ *See, e.g.*, *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Gisbert v. U.S. Att’y Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454–55 (11th Cir. 1986).

¹⁴¹ 274 F.3d 337 (6th Cir. 2001).

¹⁴² *Id.* at 376.

violation of customary international law is a domestic question that must be answered by the executive and legislative branches. We hold that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it [sic] their constitutional role to determine the extent of this country's international obligations and how best to carry them out.¹⁴³

This reasoning sounds in political question terms.

In some of the cases involving customary international law claims, the courts have specifically invoked the political question doctrine. In *El-Shifa Pharmaceutical Industries Co. v. United States*,¹⁴⁴ for example, the owners of a Sudanese pharmaceutical plant sued the United States for having destroyed the plant in a mistaken missile strike without paying just compensation, allegedly in violation of international law, and for defaming them by suggesting that they were connected to the Al Qaeda leader Osama bin Laden.¹⁴⁵ The D.C. Circuit held that the claim was barred by the political question doctrine, reasoning that “courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security.”¹⁴⁶ Because it applied the political question doctrine, the court said that it need not decide “whether customary international law requires compensation in these circumstances, or, if so, whether the plaintiffs have adequately stated a federal cause of action.”¹⁴⁷

The Supreme Court's approach to litigation under the ATS is also in line with the judiciary's general insistence on political branch direction. The ATS can be seen as congressional authorization for applying customary international law, and, in that sense, might overcome political question concerns.¹⁴⁸ But the statute is over 230 years old and is written in purely jurisdictional terms, so it provides courts with little guidance

¹⁴³ *Id.* at 375–76.

¹⁴⁴ 607 F.3d 836 (D.C. Cir. 2010).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 842.

¹⁴⁷ *Id.* at 844; *see also, e.g.,* *Jaber v. United States*, 861 F.3d 241, 249 (D.C. Cir. 2017) (applying the political question doctrine to bar a challenge to a U.S. drone strike that was allegedly carried out in violation of domestic and international law because the suit “would require the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target”).

¹⁴⁸ *But see* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823, 827 (D.C. Cir. 1984) (Robb, J., concurring in the result) (arguing that an ATS suit relating to a terrorist attack in the Middle East presented a political question, and observing that “[c]ourts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations”).

about how to handle modern claims under customary international law.¹⁴⁹ This and other considerations have led the Court to conclude that the statute should not be applied to foreign torts or against foreign corporations because of “the danger of unwarranted judicial interference in the conduct of foreign policy.”¹⁵⁰ Even before that, the Court had said that the ATS could be applied only to a modest number of customary international law claims because, among other things, “the potential implications for the foreign relations of the United States of recognizing [new causes of action for violations of international law] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”¹⁵¹

When courts do address questions of customary international law, they are likely to give substantial deference to the views of the executive branch about its content, just as they do for treaties. The *Restatement (Third) of Foreign Relations Law* explained that courts give “particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters.”¹⁵² If anything, one should expect greater deference than for treaties, given that customary international law is an evolutionary body of law that is itself potentially affected by the positions of the political branches, especially the executive branch. As the Court observed in *Sabbatino*, “the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.”¹⁵³

¹⁴⁹ See 28 U.S.C. § 1350.

¹⁵⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); see also *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018). Other doctrinal limitations also reflect this concern. See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020) (disallowing a constitutional damages claim for a cross-border shooting because of the foreign relations context and noting that “unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in [these matters]” (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988))).

¹⁵¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

¹⁵² RESTATEMENT (THIRD), *supra* note 106, § 112 cmt. c; see also, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 44 (E.D.N.Y. 2005) (“[W]ere the Court to address plaintiffs’ international law claims, it should give deference to the Executive’s interpretation of the relevant treaties and customary international law. The Executive branch has significant expertise in the formulation and interpretation of both treaties and customary international law, which this Court should accord the substantial deference it is traditionally afforded.”).

¹⁵³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432–33 (1964); see also, e.g., *Usoyan v. Republic of Turkey*, 6 F.4th 31, 42 (D.C. Cir. 2021) (noting that “the United States’ legal position is itself evidence of international law”).

III. IMPLICATIONS

Recovering what foreign relations law scholars from an earlier era understood about the political question doctrine sheds light on foreign relations law today, even though some of the labels have changed. The general theme is that U.S. courts follow the lead of the political branches when faced with questions concerning the rights and responsibilities of the United States and other countries under international law. They employ a range of doctrines in doing so, including the political question doctrine. These doctrines tend to empower the executive branch as the lead organ of the United States in its foreign relations, but they are generally subject to being altered or overridden by Congress.

In several respects, this account also helps explain the political question doctrine itself. First, contrary to Louis Henkin's famous contention, there really was a political question doctrine before *Baker*. Henkin maintained that the pre-*Baker* decisions "called only for the ordinary respect by the courts for the political domain. Having reviewed, the Court refused to invalidate the challenged actions because they were within the constitutional authority of President or Congress."¹⁵⁴ Henkin's description of the relevant foreign relations cases, however, was brief. He merely noted that:

Recognizing a particular regime as the government of a foreign country, accepting the sovereignty of a foreign country over given territory, or claiming sovereignty for the United States are neither findings of fact nor legal conclusions (which a court might review) but political positions taken by the President on behalf of the United States, and his to take under the Constitution.¹⁵⁵

Henkin's description is an incomplete summary of the cases, and his description neglects to mention an important feature of the disputes: their international law backdrop.

Second, and relatedly, there is more continuity between the modern political question doctrine and the historic political question doctrine than some commentators have realized. For example, in her valuable historical account, Tara Grove has argued that "[a]lthough courts in the nineteenth century did apply a 'political question doctrine,' the doctrine that existed at that time was strikingly different from the current version."¹⁵⁶ Under her account, historically "political questions were *factual* determinations made by the political branches that courts treated as

¹⁵⁴ Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 601 (1976).

¹⁵⁵ *Id.* at 612.

¹⁵⁶ Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911 (2015).

conclusive in the course of resolving cases.”¹⁵⁷ As we have seen, however, political questions often had a legal component—in particular, international law. Grove appears to acknowledge this,¹⁵⁸ and, in any event, her claim of discontinuity is mainly about how, unlike the modern political question decisions, “the traditional doctrine did not encompass constitutional questions (that is, the determination whether a statute or other governmental action complied with the Constitution).”¹⁵⁹ That is an important observation, but it can potentially obscure elements of continuity between the historic and modern decisions. Most lower court decisions that apply the political question doctrine today do not involve constitutional issues. And, as discussed, an important strand of the modern political question doctrine in the foreign affairs area is a continuation of the historic decisions, designed to ensure political branch control over international law. The political question doctrine, moreover, is one of many rules and doctrines today that serve this function.¹⁶⁰

Third, commentary on the modern political question doctrine tends to view it as entailing a permanent abdication of judicial review, and commentators often criticize it accordingly.¹⁶¹ Importantly, however, in most of the decisions discussed above, the courts were not disallowing

¹⁵⁷ *Id.*

¹⁵⁸ Grove notes, for example, that the issues addressed in the historic political question decisions would likely be viewed today as involving *mixed* questions of law and fact. *See id.* at 1918. That is correct, although it was probably also true at the time those cases were decided. *Cf.* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 460 (2017) (noting that, historically, the political question doctrine meant that “some political actor’s decision applying law to fact is accorded the finality that the courts’ judgments enjoy”). Grove further acknowledges that the historic decisions may have been willing to “treat as conclusive the political branches’ determination of (what we would today view as) mixed questions or even pure questions of international or foreign law.” Grove, *supra* note 154, at 1918 n.41.

¹⁵⁹ Grove, *supra* note 154, at 1918 n.41.

¹⁶⁰ Jack Goldsmith has suggested that the political question doctrine was more “categorical” before *Baker*’s recitation of six factors. *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1401 (1999). But the factors recited in *Baker* were drawn from the reasoning in the earlier cases; those were the justifications for the categories. Moreover, there are also post-*Baker* categories, some of which, as this Essay has shown, are similar to the pre-*Baker* ones.

¹⁶¹ *See, e.g.*, Linda Champlin & Alan Schwartz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 232 (1985) (“[W]hile a case dismissed because of party status might subsequently be adjudicated in other circumstances, a political question, as a non-justiciable *issue*, would, like the ancient mariner, forever roam the seas, never to be resolved.”); Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1039 (2012) (“The ‘political question’ doctrine also carves out large domains in which judicial settlement of a constitutional question will never be available, even when judicially cognizable harms have occurred.”); Redish, *supra* note 89, at 1060 (“While the so-called ‘undemocratic’ nature of judicial review could conceivably justify an appropriate degree of judicial deference to the political branches in certain cases, it cannot justify total judicial abdication, at least without undermining the use of judicial review in all of its applications.”). *But cf.* CHEMERINSKY, *supra* note 3, at 170 (noting that “it is uncertain whether the political question doctrine is constitutional, prudential,

Congress from statutorily authorizing judicial review. Congress can, for example, execute or override treaties, regulate sovereign immunity, limit the act of state doctrine, and incorporate customary international law, and these statutes will be judicially enforceable. In other words, the political question doctrine as applied to foreign affairs tends to operate within category two of Justice Jackson's framework from *Youngstown Sheet & Tube Co. v. Sawyer*—the “zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.”¹⁶² Consistent with this observation, the Supreme Court has been disinclined to apply the doctrine in situations in which there is a challenge to the constitutionality of a statute.¹⁶³ The doctrine, in other words, is generally subconstitutional in its effect.¹⁶⁴

CONCLUSION

This Essay offers a descriptive account of an important strand of the political question doctrine rather than a normative defense of that strand. Nevertheless, critics of the political question doctrine should be aware of how the doctrine has actually been applied, so that they can accurately evaluate the functions that it has been serving. They should also consider the possibility that restrictions on the political question doctrine might just shift some of its considerations to other limiting doctrines, or to the merits. And they should be realistic about the extent to which greater judicial review in the foreign affairs area will actually reduce the influence of politics, let alone produce better decisions.¹⁶⁵

or both,” and asking, “[c]ould Congress direct the federal courts to adjudicate a matter that the Supreme Court deemed to be a political question?”).

¹⁶² 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹⁶³ See, e.g., *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012); *INS v. Chadha*, 462 U.S. 919, 941–42 (1983).

¹⁶⁴ For additional discussion of this point, see Bradley & Posner, *supra* note 87, at 1072–73. There are some areas of executive authority that are exclusive to the President and thus cannot be limited by Congress. The Supreme Court has held that the recognition power is one of these areas. See *Zivotofsky v. Kerry*, 576 U.S. 1, 28 (2015). But, as Justice Jackson emphasized in *Youngstown*, presidential power is at its “lowest ebb” when exercised in the face of a congressional restriction and presidential claims to exclusive authority “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” 343 U.S. at 637–38 (Jackson, J., concurring).

¹⁶⁵ See, e.g., Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411 (2015) (arguing, based on an empirical assessment, that the shift from executive control over sovereign immunity determinations to judicial control did not reduce the influence of politics and may have actually increased it).