

**THE RETURN OF CLASSICAL POLITICAL QUESTION  
DOCTRINE IN *ZIVOTOFSKY EX REL. ZIVOTOFSKY V.  
CLINTON*, 132 S. CT. 1421 (2012)**

During his Supreme Court confirmation hearings, Chief Justice Roberts famously said, “I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”<sup>1</sup> But he went on to draw another comparison between judges and umpires that is less well-remembered: “The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . .”<sup>2</sup> In making this remark, Chief Justice Roberts alluded to his belief that the judiciary has not only the *ability* to interpret the law, but the *obligation* to resolve disputes; it has a “duty . . . to say what the law is,”<sup>3</sup> as Chief Justice John Marshall so eloquently stated.

In 2012, the Court reaffirmed its commitment to this obligation in *Zivotofsky ex rel. Zivotofsky v. Clinton*,<sup>4</sup> in which the Court rejected the argument that whether an American citizen born in Jerusalem can enforce his statutory right to have “Israel” listed as his birthplace on his passport is a nonjusticiable political question.<sup>5</sup> A judge will dismiss a case under the political question doctrine when he believes its resolution properly belongs to the other, political branches of the government. In its “classical” form, the political question doctrine was invoked to dismiss cases only when the text and structure of the Constitution itself demanded it. Prudential considerations, however, gradually became intermingled with textual ones, and courts began to dismiss cases for a combination of textual and prudential reasons. Then, in the 1962 case *Baker v. Carr*,<sup>6</sup> the Supreme Court laid out a six-factor test for identifying cases that present nonjusticiable political questions:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

2. *Id.* at 55.

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

4. 132 S. Ct. 1421 (2012).

5. *Id.* at 1425, 1430.

6. 369 U.S. 186 (1962).

commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>7</sup>

This test became the touchstone for federal courts' political question analysis and accelerated the lower courts' trend toward the prudential political question doctrine by legitimating both textual and prudential concerns as independent bases for dismissal. But since *Baker*, the Supreme Court has retreated from the prudential political question doctrine, while lower federal courts, particularly in cases implicating foreign affairs powers, have increased its use. The Court seized the opportunity presented by *Zivotofsky* to reassert the classical, pre-*Baker* interpretation of the political question doctrine, implicitly but conspicuously disavowing the prudential theory even in foreign affairs cases. *Zivotofsky* thus displaces *Baker's* six-factor test and substitutes classical political question analysis in its place.

I. THE SUPREME COURT'S DECISION IN *ZIVOTFSKY EX REL. ZIVOTFSKY V. CLINTON*

In 2002, Congress passed the Foreign Relations Authorization Act for the Fiscal Year 2003,<sup>8</sup> which contains a number of directives aimed at solidifying the United States' recognition of Jerusalem as the capital of Israel. These include a requirement that the Secretary of State list Israel as the place of birth for any person born in the city of Jerusalem who so requests.<sup>9</sup>

A few months after the statute was enacted, Menachem Bin-yamin Zivotofsky was born in Jerusalem to two American parents, and his mother filed an application on his behalf to obtain

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7. *Id.* at 217. Although the test is phrased disjunctively, indicating that each prong could function as an independent and sufficient basis for dismissal, in the decades since *Baker* the Court has accorded different weight to each of the six factors, treating some as dispositive and others as part of a balancing test.

8. Pub. L. No. 107-228, 116 Stat. 1350 (2002).

9. *Id.* § 214(d), 116 Stat. at 1366 (codified at 22 U.S.C. § 2651 (2006)).

a United States passport and Consular Report of Birth.<sup>10</sup> On the application, she listed his place of birth as “Jerusalem, Israel.”<sup>11</sup> Because of the State Department’s longstanding policy of taking no position on whether Jerusalem is a part of Israel,<sup>12</sup> officials informed Mrs. Zivotofsky that the Department could list only “Jerusalem” and not “Israel” on these documents.<sup>13</sup>

Zivotofsky, through his parents, sued the Secretary of State in September 2003, seeking an order directing the State Department to issue him a passport and Report of Birth listing “Jerusalem, Israel” as his place of birth.<sup>14</sup> The United States District Court for the District of Columbia dismissed the suit on two alternative grounds: first, that Zivotofsky lacked Article III standing to sue the Secretary of State,<sup>15</sup> and second, that the case presented a non-justiciable political question.<sup>16</sup> The Court of Appeals for the District of Columbia Circuit reversed the trial court’s ruling on Article III standing<sup>17</sup> and remanded for a fuller development of the record on the political question determination.<sup>18</sup> On remand and after further briefing, the D.C. District Court again held that the case did present a nonjusticiable political question,<sup>19</sup> relying on *Baker’s* six-factor test as dispositive.<sup>20</sup> The D.C. Circuit affirmed this holding, although its analysis rested exclusively on the first *Baker* factor: whether resolution of the issue “ha[d] been committed to the political branches by the text of the Constitution.”<sup>21</sup>

The Supreme Court granted certiorari and, in March 2012, vacated the D.C. Circuit’s opinion and remanded the case for deci-

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10. *Zivotofsky*, 132 S. Ct. at 1425.

11. *Id.*

12. *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1228 (D.C. Cir. 2009).

13. *Id.* at 1229.

14. *Zivotofsky ex. rel. Zivotofsky v. Sec’y of State*, Nos. 03-1921, 03-2048, 2004 WL 5835212, at \*2 (D.D.C. Sept. 7, 2004).

15. *Id.* at \*3.

16. *Id.* at \*4.

17. *Zivotofsky ex. rel. Ari Z. v. Sec’y of State*, 444 F.3d 614, 618–19 (D.C. Cir. 2006).

18. *Id.* at 619–20.

19. *Zivotofsky ex. rel. Zivotofsky v. Sec’y of State*, 511 F. Supp. 2d 97, 99 (D.D.C. 2007).

20. *Id.* at 102 (“The Government argues that five of the six *Baker* factors apply in this case. When we apply these factors of the *Baker* analysis to this case, we see that it raises a quintessential political question which is not justiciable by the courts.”).

21. *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1230 (D.C. Cir. 2009) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

sion on the merits.<sup>22</sup> Writing for the majority, Chief Justice Roberts held that the case did not present a nonjusticiable political question.<sup>23</sup> The Chief Justice defined the political question doctrine as a “narrow” exception to the general rule that the judiciary has the “responsibility to decide cases properly before it.”<sup>24</sup> Avoiding any reliance on the *Baker* test, but restating its first two factors, the Court held that a political question exists “‘where there is 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.’”<sup>25</sup> The D.C. Circuit, the Chief Justice explained, had conflated a policy issue properly left to the political branches—whether Jerusalem is the capital of Israel—with the legal question before it—whether Zivotofsky may enforce his statutory right to have Israel listed on his passport.<sup>26</sup> Adjudicating this claim would entail nothing more than deciding whether the statute unconstitutionally encroaches on the President’s foreign affairs power, and therefore, whether the individual right it confers may be vindicated.<sup>27</sup> Enforcing the separation of powers and individual rights, the Chief Justice wrote, is not only within the courts’ province, it is “what courts do.”<sup>28</sup> Therefore, the case must be decided on the merits.<sup>29</sup>

Justice Sotomayor, joined in part by Justice Breyer, wrote separately to concur in the judgment, expressing concern that the Court had overcome the political question hurdle too quickly.<sup>30</sup> Justice Sotomayor wrote that analysis of the *Baker* factors was missing from the Court’s opinion, and she engaged in a detailed review of the Court’s post-*Baker* political question jurisprudence.<sup>31</sup> She separated the *Baker* factors into three categories: textual commitment to a coordinate political branch,<sup>32</sup> “circumstances in which a dispute calls for decisionmaking beyond courts’ compe-

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22. Zivotofsky *ex rel.* Zivotofsky, 132 S. Ct. 1421, 1431 (2012).

23. *Id.* at 1430.

24. *Id.* at 1427.

25. *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*, 369 U.S. at 217) (quotation marks omitted)).

26. *Id.*

27. *Id.* at 1427–28.

28. *Id.* at 1430.

29. *Id.*

30. *Id.* at 1431 (Sotomayor, J., concurring).

31. *Id.* at 1431–34.

32. *Id.* at 1431–32.

tence,”<sup>33</sup> and “circumstances in which prudence may counsel against a court’s resolution of an issue presented.”<sup>34</sup> Largely for the reasons identified in Chief Justice Roberts’ majority opinion, Justice Sotomayor agreed that this case did not present a political question under the first *Baker* factor—the only factor the D.C. Circuit addressed.<sup>35</sup> Justice Sotomayor, however, emphasized the continuing vitality of her third category—prudential considerations—warning that though cases meriting dismissal on the basis of the final three *Baker* factors alone are rare, the possibility of such a dismissal is an important relic of the common law backdrop against which Article III was written.<sup>36</sup>

Justice Alito also wrote a separate, brief concurring opinion,<sup>37</sup> outlining the respective cases for Congressional and Executive control over the issuance of passports<sup>38</sup> and concluding that “[d]elineating the precise dividing line between the powers of Congress and the President with respect to the contents of a passport is not an easy matter, but . . . it does not constitute a political question that the Judiciary is unable to decide.”<sup>39</sup>

Justice Breyer was the lone dissenter.<sup>40</sup> He joined the portion of Justice Sotomayor’s concurrence devoted to the continuing importance of the *Baker* factors, but believed that in *Zivotofsky*, those factors—in his view, the final four factors in particular—embodied prudential considerations that should have led the Court to dismiss the case.<sup>41</sup> Justice Breyer, however, moved beyond *Baker* as the basis for his dissent, identifying four additional sets of considerations that, “taken together,”<sup>42</sup> counseled against reaching the merits in this case.<sup>43</sup> First, he identified and endorsed “judicial hesitancy to make decisions that have significant foreign policy implications . . . .”<sup>44</sup> Second, Justice Breyer noted that as a necessary part of its analysis on the merits in this case, a court

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33. *Id.* at 1432.

34. *Id.* at 1432–34.

35. *Id.* at 1434.

36. *Id.* at 1433–34.

37. *Id.* at 1436 (Alito, J., concurring).

38. *Id.*

39. *See id.* at 1436–37.

40. *See id.* at 1437 (Breyer, J., dissenting).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1438.

could be forced to determine how far the statute encroaches on the President's foreign affairs power to determine whether such an interference is constitutionally significant—a determination that courts are ill-equipped to make.<sup>45</sup> Third, Zivotofsky's injury was more "akin to an ideological interest"<sup>46</sup> than to a violation of the kind of basic individual right, such as a right to property or to one's bodily integrity, that courts have traditionally sought to protect.<sup>47</sup> Fourth, the political branches have nonjudicial methods of working out their differences, so the courts' involvement in this case may be unnecessary.<sup>48</sup> Justice Breyer concluded that he would dismiss the case as a political question because it was unusual in its "minimal need for judicial intervention" and in its potential to create "embarrassment," policy disruption, and an impression of disrespect for the other branches.<sup>49</sup>

## II. THE PRE-BAKER ERA: THE COURT'S DEVELOPMENT OF THE CLASSICAL AND PRUDENTIAL THEORIES OF THE POLITICAL QUESTION DOCTRINE

The political question doctrine has its roots in a passage from Chief Justice John Marshall's famous opinion in *Marbury v. Madison*,<sup>50</sup> in which he interpreted the role of the federal courts in the new constitutional system:

The 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. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.<sup>51</sup>

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45. *Id.* at 1438–39 (“[I]t may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only whether but also the extent to which enforcement will interfere with the President’s ability to make significant recognition-related foreign policy decisions.”).

46. *Id.* at 1440.

47. *Id.* at 1440–41.

48. *Id.* at 1441.

49. *Id.*

50. 5 U.S. (1 Cranch) 137 (1803).

51. *Id.* at 170.

Scholars have read this earliest incarnation of the political question doctrine as an acknowledgement that the doctrine stems from the Constitution's separation of powers.<sup>52</sup>

In the years following *Marbury*, the Supreme Court applied the "classical" version of the political question doctrine,<sup>53</sup> under which courts have not only the ability, but also the obligation to decide cases or controversies that come before them, unless the Constitution has committed the power to decide the issue to another branch of government.<sup>54</sup> Accordingly, early applications of the political question doctrine focused closely on constitutional text and structure.<sup>55</sup>

Soon, however, the Court began to consider arguments from outside the four corners of the Constitution when making political question determinations. These new, prudential considerations included whether the case concerned an individual right or a more general policy, the type of evidence and reasoning necessary to resolve the matter, the sensitivity of the national interests involved, and the clarity of established legal standards for resolving the issue.<sup>56</sup> Introduction of these considerations into political question analysis represented a fundamental break from the classical theory because such considerations undermined the principle that courts were *obligated* to decide the cases that came before them.<sup>57</sup> This development thus spawned an entirely new era in the history of the political question doctrine in which the "prudential" theory rose to prominence.<sup>58</sup>

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52. See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 249 (2002) (arguing that Chief Justice Marshall's understanding that the courts lack power to decide issues committed to the political branches' discretion is rooted in the Constitution).

53. The classical political question doctrine was first identified by that name in Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 517 (1966).

54. See *id.* at 517–18.

55. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (holding that the power to decide whether Rhode Island had a republican government consistent with the Guarantee Clause belonged to Congress rather than to the courts); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 325 (1819) (holding that Congress, rather than the courts, determines the boundaries of the Necessary and Proper Clause).

56. See Barkow, *supra* note 52, at 254.

57. See Scharpf, *supra* note 53, at 520.

58. Even during the period when the classical theory was dominant, prudential considerations sometimes crept into political question cases. For example, in *Luther v. Borden*, the Court began its opinion by listing a parade of horrors that

Interestingly, however, even as the prudential theory's star was rising, the Supreme Court hesitated to base its political question dismissals on prudential considerations alone. Instead, the Court developed a pattern of identifying two alternative bases for its political question dismissals—one classical and one prudential—and failing to identify which was controlling.<sup>59</sup>

### III. THE POST-BAKER ERA: THE DECLINE OF THE PRUDENTIAL THEORY IN THE SUPREME COURT, AND ITS PERSISTENCE IN THE LOWER COURTS

In the watershed case of *Baker v. Carr*,<sup>60</sup> the Court engaged in a wholesale review and summary of its existing political question jurisprudence,<sup>61</sup> distilling it into a six-factor test<sup>62</sup> that has been applied in almost every political question case decided since.<sup>63</sup>

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could ensue if the Court decided the case on the merits. *Luther*, 48 U.S. (7 How.) at 38–39. The Court's ultimate decisions in these early cases, however, were grounded firmly in the text and structure of the Constitution. For instance, in *Luther*, the Court mentioned prudential considerations simply to underscore the importance of accurately conducting its constitutional analysis. *See id.* at 39 (“When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.”).

59. *See, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 554–56 (1946); *Coleman v. Miller*, 307 U.S. 433, 454–56 (1939); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 141–43 (1912).

60. The case was brought during the Civil Rights Era, when the Warren Court was active in ensuring that the rights of minorities could be exercised in practice. *See generally, e.g.*, Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055 (2002).

61. *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“[B]ecause there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the ‘political question’ doctrine.”). Interestingly, although *Baker v. Carr* on its face greatly extended the reach of the political question doctrine, the *Baker* court did not avail itself of this expanded doctrine to dismiss the case. Rather, its rationale for summarizing the Court's political question jurisprudence to date was to cabin the political question doctrine in a way that allowed it to reach the merits of the case at bar. The Court achieved this goal by finding that the political question doctrine's application was limited to settings involving the division of power between the various branches of the federal government; it had no application to the division of power between the federal and state governments, which was at issue in *Baker*. *See id.* at 217–18.

62. *See supra* text accompanying note 7.

63. *E.g.* *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358–59 (11th Cir. 2007) (collecting cases that emphasize the dominance of the *Baker* test); Joseph H.L. Perez-Montes, *Note, Justiciability in Modern War Zones: Is the Political Question*



The test legitimated the prudential theory by putting its first two factors—embodying the classical version of the doctrine—on a par with its final four prudential factors. Because the six factors are disjunctive, the literal effect of the test was to hold that the presence of any prudential factor, standing alone, could be sufficient to dismiss a claim under the political question doctrine. In addition, *Baker* validated the Court's historical practice of dismissing foreign affairs cases as political questions more readily than cases dealing with purely domestic matters.<sup>64</sup> Although the Court had not explicitly defined a different standard for foreign affairs cases, earlier cases implicitly endorsed a lower threshold for political question dismissals in those cases.<sup>65</sup>

On its face, the *Baker* framework authorized courts to use greater latitude in granting political question dismissals on prudential grounds. After *Baker*, however, the prudential theory fell out of favor in the Supreme Court.<sup>66</sup> Only two Supreme Court cases since *Baker* have dismissed claims as nonjusticiable under the political question doctrine,<sup>67</sup> and both rested firmly on classical political question grounds. *Gilligan v. Morgan*<sup>68</sup> dismissed as nonjusticiable students' attempts to bar the Governor of Ohio from calling in the National Guard to suppress civil disorder at state universities.<sup>69</sup> In granting this dismissal,

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*Doctrine a Viable Bar to Tort Claims Against Private Military Contractors?*, 83 TUL. L. REV. 219, 232 (2008) ("Baker's six factors have become the foundation for modern application of the doctrine.").

64. *Baker*, 369 U.S. at 211–12. ("There are sweeping statements [in the Court's previous cases] to the effect that all questions touching foreign relations are political questions.").

65. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."); *United States v. Lee*, 106 U.S. 196, 209 (1882) ("[In cases which] might involve war or peace . . . the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."); THOMAS M. FRANCK, POLITICAL QUESTIONS / JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 13–15 (1992).

66. See Barkow, *supra* note 52, at 267–73.

67. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1237 (D.C. Cir. 2009) (Edwards, J., concurring); Barkow, *supra* note 52, at 267–68.

68. 413 U.S. 1 (1973).

69. *Id.* at 3, 11–12.

the Court reasoned that Article I, Section 8, Clause 16 of the Constitution explicitly grants to Congress the power “[t]o provide for organizing, arming, and disciplining the militia.”<sup>70</sup> Similarly, in *Nixon v. United States*,<sup>71</sup> the Court reviewed Judge Walter Nixon’s claims that his impeachment trial violated the Constitution’s Impeachment Trial Clause<sup>72</sup> because it was conducted by a committee of the Senate rather than by the full body.<sup>73</sup> Discussing whether the case presented a political question, the Court cited only the first two *Baker* factors<sup>74</sup> and held that the determination of what constitutes a trial under the Impeachment Trial Clause is textually committed to the Senate.<sup>75</sup>

But despite the Court’s recent, consistent distaste for prudential considerations as a sufficient basis for political question dismissals,<sup>76</sup> many lower courts continue to apply prudential analysis, particularly in cases touching on foreign affairs.<sup>77</sup> Citing *Baker*’s prudential factors, courts have dismissed as nonjusticiable cases challenging, for example, State Department officials’ refusal to testify concerning a United States citizen who had been imprisoned in Mexico,<sup>78</sup> President Reagan’s failure to

70. *Id.* at 6 (quoting U.S. CONST. art. I, § 8, cl. 16); see also Barkow, *supra* note 52, at 269–70 (noting that “classical analysis prevailed” in *Gilligan*).

71. 506 U.S. 224 (1993).

72. U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

73. *Nixon*, 506 U.S. at 226.

74. *Id.* at 228.

75. *Id.* at 228–29. But see Barkow, *supra* note 52, at 272 n.186 (“[A]lthough the Court [in *Nixon*] minimized the independent significance of the prudential factors, it does not appear that it meant to foreclose their use entirely . . .”).

76. See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (stating that the *Baker* factors “are probably listed in descending order of both importance and certainty,” indicating that the prudential factors should be accorded less weight than their classical counterparts); Barkow, *supra* note 52, at 299–300 (arguing that the Supreme Court’s failure to raise the possibility that the 2000 presidential election cases should be dismissed on political question grounds threatens the very existence of the political question doctrine, because there is a compelling argument to be made that Article II, Section 1, Clause 2 commits oversight of the elector selection process to Congress).

77. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1402–03 (1999) (collecting lower court cases relying on *Baker* to dismiss foreign affairs cases under the prudential political question doctrine); Perez-Montes, *supra* note 63, at 233 (noting that since *Baker*, “courts have declined to review foreign or military affairs claims under the political question doctrine with some consistency.”).

78. *Flynn v. Schultz*, 748 F.2d 1186, 1186–87, 1193 (7th Cir. 1984).

report activities in the Persian Gulf,<sup>79</sup> the United States' refusal to compensate crew members of a Turkish destroyer who were injured and killed during United States naval exercises,<sup>80</sup> and the North American Free Trade Agreement's status as a "treaty" requiring Senate ratification.<sup>81</sup>

The basis for distinguishing between purely domestic cases and those that implicate foreign affairs is at least threefold. First, at least since *Marbury*, lawyers and judges have perceived foreign affairs as somehow fundamentally different from all other state concerns.<sup>82</sup> Second, dicta from *Baker* itself distinguished cases affecting foreign affairs from those implicating only domestic concerns.<sup>83</sup> Third, in a pair of opinions handed down in 2004, the Supreme Court implied that the executive is entitled to a high degree of deference in the foreign relations arena.<sup>84</sup>

#### IV. ZIVOTOFSKY'S DISAVOWAL OF THE PRUDENTIAL POLITICAL QUESTION DOCTRINE AND ABROGATION OF THE *BAKER* TEST

In light of the convoluted history of the Supreme Court's political question doctrine jurisprudence, Chief Justice Roberts' majority opinion in *Zivotofsky* is most notable for what it does

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

80. *Aktepe v. United States*, 105 F.3d 1400, 1401–02, 1404 (11th Cir. 1997).

81. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001).

82. FRANCK, *supra* note 65, at 3 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166–67 (1803) ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs . . . The acts of such an officer, as an officer, can never be examinable by the courts.")). Franck writes that "[w]hatever Marshall's intent in these paragraphs, the effect was to initiate a constitutional theory, still asserted by many lawyers and judges, that foreign affairs are *different* from all other matters of state in some crucial fashion." *Id.*

83. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[R]esolution of [questions touching foreign relations] frequently turn[s] on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or the legislature; but many such questions uniquely demand single-voiced statement of the Government's views.").

84. *See Note, The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1193, 1196 (2009). The two cases are *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In the wake of these decisions, lower courts dramatically increased their use of the political question doctrine to dismiss cases touching on foreign affairs. Note, *supra*, at 1196.

not say. The opinion contains two significant omissions, both of which Justice Sotomayor criticized in her concurrence:<sup>85</sup> (1) any consideration of prudential factors, and (2) any acknowledgment of the *Baker* test as the presumptive framework for political question analysis. These related omissions together make the Court's opinion a striking endorsement of the classical, rather than the prudential, political question doctrine.

The Court's failure to consider prudential factors in *Zivotofsky* is significant because the case possesses precisely the features that historically have weighed strongly in favor of a prudential political question dismissal. First, if a court were to enforce the Foreign Relations Authorization Act in this case, it could effectively resolve one of the country's most sensitive foreign relations questions: the political status of Jerusalem.<sup>86</sup> Strong arguments could be made that the fourth, fifth and sixth *Baker* factors—which are present when a court's decision could express a lack of respect for coordinate branches of the federal government, when there is an “unusual” need for the court to adhere to a decision that has already been made, and when there is a potential for embarrassment to the United States resulting from the conflicting decisions of various branches<sup>87</sup>—were all present in *Zivotofsky*. Yet, despite this potential for severe diplomatic disruption, the Court did not so much as pause to consider these consequences.<sup>88</sup>

Second, as Justice Breyer emphasized in his dissent, the alignment of institutional interests in this case would almost certainly be sufficient to dismiss the case under a prudential analysis.<sup>89</sup> *Zivotofsky* did assert a violation of his individual right to have Israel listed on his passport, but compared to the individual rights the courts usually protect, this is hardly a grievous injury.<sup>90</sup> Especially when this weak individual interest is pitted against the strong institutional interests of the government, such as the desire not to “critically compromise the ability of the United States to work with Israelis, Palestinians and others in

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85. See *supra* text accompanying notes 30–36.

86. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1429 (2012).

87. See *Baker*, 369 U.S. at 217.

88. See *supra* text accompanying notes 23–29.

89. *Zivotofsky*, 132 S. Ct. at 1437, 1441 (Breyer, J., dissenting); *supra* text accompanying notes 41–49.

90. *Zivotofsky*, 132 S. Ct. at 1440–41 (Breyer, J., dissenting).

the region to further the peace process,"<sup>91</sup> prudential considerations lean strongly against reaching the merits.<sup>92</sup>

Although the individual interest asserted in this case may have been weak, the Court chose to protect it above the weighty foreign policy considerations put forward by the United States government. *Zivotofsky* is thus a powerful statement that the Court will not be deterred from vindicating individual rights simply because the government asserts that it would be dangerous for the Court to do so. This feature of *Zivotofsky* is reminiscent of Chief Justice Marshall's insight that the courts have an obligation to hear cases properly before them, which is central to their role in the constitutional separation of powers.<sup>93</sup> Chief Justice Roberts' statement that resolving claims such as *Zivotofsky*'s "is what courts do"<sup>94</sup> reasserts this aspect of the classical doctrine.<sup>95</sup>

Third, *Zivotofsky*'s claims implicate foreign affairs, and it is in such cases that lower federal courts have been most willing to grant political question dismissals.<sup>96</sup> Indeed, as discussed above, lower courts have increased the frequency of these dismissals in recent years.<sup>97</sup> By failing to consider as part of its political question analysis the State Department's arguments about the effect of a ruling on United States foreign relations,<sup>98</sup> and by clarifying that these considerations instead go to the merits of the case,<sup>99</sup> *Zivotofsky* makes clear that no special deference to the executive is warranted on the threshold issue of justiciability simply because resolution of the case may impact foreign affairs.

The Court's failure to perform any kind of prudential analysis in *Zivotofsky* is a manifest rejection of the prudential theory's place in political question determinations. If a prudential political question analysis is not called for in this case, it is difficult

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91. *Id.* at 1440.

92. *Id.* (stating that *Zivotofsky*'s "countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones").

93. *See supra* text accompanying notes 50–52.

94. *Zivotofsky*, 132 S. Ct. at 1430.

95. *See supra* text accompanying notes 53–54.

96. *See supra* text accompanying notes 77–81.

97. *See supra* note 84.

98. *See Zivotofsky*, 132 S. Ct. at 1428 (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)) ("[C]ourts cannot avoid their responsibility merely 'because the issues have political implications.'").

99. *See id.* at 1428–30.

to imagine a case in which it would be appropriate.<sup>100</sup> This case thus represents a return to the pure classical theory of the political question doctrine.

But if prudential considerations no longer have a place in political question analysis, then what is left of *Baker v. Carr*? The Court analyzed Zivotofsky's claims under the first two *Baker* factors,<sup>101</sup> but it did so without attributing this analysis to the *Baker* test.<sup>102</sup> In fact, the Chief Justice omits any mention of *Baker's* six-factor test.<sup>103</sup> The Court, however, easily could have reached the same result using the *Baker* framework, as Justice Sotomayor in fact did in her concurrence.<sup>104</sup>

If the Court had examined Zivotofsky's claims under the *Baker* framework, it would have signaled that the test continues to be the yardstick for analyzing political question dismissals. Even if the Court had ceased its analysis after considering the first two *Baker* factors, the analysis would have implicitly endorsed consideration of the remaining four prudential factors in appropriate cases in the future. By mentioning the *Baker* test at all, the Court would have implied that all of its factors, including the prudential ones, continue to be relevant.

Strikingly, however, the Court eschewed the *Baker* test, which is universally understood to be, and is employed by the lower federal courts as, the touchstone of the modern incarnation of the political question doctrine.<sup>105</sup> The D.C. District Court opinion,<sup>106</sup> the D.C. Circuit Court opinion,<sup>107</sup> and Justice Sotomayor's concurrence<sup>108</sup> all analyzed Zivotofsky's claims under this test. Therefore, it is unlikely that the Chief Justice did not think to, or innocuously chose not to, structure his opinion

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100. See *id.* at 1437, 1441 (Breyer J., dissenting). Throughout his dissent, Justice Breyer highlights that this case is "rare" and "unusual" in the degree to which prudential considerations weigh in favor of dismissal. *Id.* at 1437–41.

101. *Id.* at 1427. Taken together, these are the *Baker* factors that embody the classical political question doctrine.

102. *Id.*

103. The Chief Justice does, however, cite directly to *Baker* once, for the proposition that courts should not decide cases that "'turn on standards that defy judicial application.'" *Id.* at 1430 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

104. See *supra* text accompanying notes 30–36.

105. See *supra* text accompanying notes 62–63.

106. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 511 F. Supp. 2d 97, 102 (D.D.C. 2007).

107. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1230, 1233 (D.C. Cir. 2009).

108. See *supra* text accompanying notes 30–36.

around the *Baker* test. Rather, his choice represents a clear departure from the established norm. This decision must have been deliberate, intended to signal that the *Baker* analysis is no longer essential to political question determinations.

Are courts to infer, as a result, that *Baker* has been implicitly overturned? In considering the answer to this question, the cleverness of Chief Justice Roberts' opinion becomes apparent: For the Court's abrogation of the *Baker* test to be consistent with *Baker* and with the Court's subsequent political question cases, there is no need to disturb the holding of *Baker*. The *Baker* Court's newly formulated test was not necessary to deciding that the case should be heard.<sup>109</sup> Nor was the *Baker* test essential to the holding in either of the Court's later cases granting political question dismissals.<sup>110</sup> Although the Court in both *Gilligan v. Morgan* and *Nixon v. United States* made its political question determinations under the terms of the first two *Baker* factors,<sup>111</sup> these factors are a mere reiteration of the classical political question theory, which existed long before the *Baker* test was developed. The Court's abrogation of the *Baker* test in *Zivotofsky*, therefore, disrupts none of its precedents and simply returns the *Baker* test to its original status as dicta.

## V. CONCLUSION

Chief Justice Roberts has reshaped the test for political question dismissals, returning it to its classical roots, simply by declining to mention the presumptive test. To be sure, this abandonment of the *Baker* test will displace fifty years of lower court jurisprudence. But this dramatic disruption in the lower courts is unlikely to cause much disturbance in the trajectory of Supreme Court jurisprudence. *Zivotofsky* thus effects a graceful sea change in justiciability analysis.

*Carol Szurkowski*

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109. *Baker v. Carr*, 369 U.S. 186, 237 (1962).

110. See *supra* text accompanying notes 68–75.

111. See *Nixon v. United States*, 506 U.S. 224, 228, 235–36 (1993); *Gilligan v. Morgan*, 413 U.S. 1, 7–8 (1973).