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Political Question Disconnects

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RESPONSES

POLITICAL QUESTION DISCONNECTS

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Professor John Harrison's The Political Question Doctrines *flags several interesting dynamics in the federal courts' treatment of the doctrine. He claims that the Supreme Court has actually applied the political question doctrine in only two situations—where it has found final decision-making authority in a non-judicial actor and where it has sought to avoid the issuance of prospective relief that intrudes too much upon the policy-making authority of other actors. He notes that the Court has never actually held that the doctrine is a limit on its subject matter jurisdiction and contends that lower courts, which have applied the doctrine in other contexts and routinely dismissed for want of subject matter jurisdiction, have strayed too far afield. This Response examines these points in turn and concludes that, while Professor Harrison's characterization of the Supreme Court's holdings is descriptively accurate, scattered tea leaves in dicta and separate opinions may give reason for skepticism that the Court has proceeded with a method to its madness.*

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INTRODUCTION

Professor John Harrison's *The Political Question Doctrines*[1] finds troubling disconnect between the Supreme Court's treatment of the political question doctrine and the way that many lower federal courts are applying it.[2] The Supreme Court, by his reckoning, has employed the doctrine in two discrete contexts.[3] First, the Court has invoked the political question doctrine where the Constitution confers final decision-making authority on a non-judicial entity.[4] In these cases, which arise rarely, the Court has treated the determination of the non-judicial entity as conclusive and controlling and adjudicated the case on that understanding.[5] Second, and relatedly, the Court has used the doctrine to sidestep the issuance of prospective relief that would trench too much on non-judicial decision-making.[6] In neither of these situations, Professor Harrison claims, has the Court expressly grounded the political question doctrine in Article III, and it follows that in neither has it actually held that the political question doctrine is a restriction on courts' subject matter jurisdiction—sporadic dicta to the contrary notwithstanding.[7]

Lower courts, according to Professor Harrison, have strayed from this orderly course in two key respects.[8] First, and perhaps most fundamentally, they have not asked the right questions.[9] Instead of examining whether the actors from a coordinate branch have *final*, and thus *conclusive*, decision-making authority, they have asked merely whether these other actors possess discretion.[10] That non-judicial actors have discretion, of course, does not mean that such discretion is boundless. Professor Harrison suggests that lower courts have abdicated in important respects by seeing invocation of the political question doctrine as the norm, rather than as a rare exception.[11] Second, lower courts have on several occasions dismissed for want of

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1. John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457 (2017).
2. *See id.* at 512–13, 517–20, 528.
3. *See id.* at 460 (dividing the Supreme Court's political question jurisprudence into non-judicial finality cases and cases dealing with prospective remedies).
4. *See id.*
5. *See id.* at 460–61, 468–70, 476–77, 481 (discussing the types of non-judicial finality cases).
6. *See id.* at 481–85.
7. *See id.* at 496–97.
8. *See id.* at 518–20.
9. *See id.* at 518.
10. *See id.* (explaining that the lower courts have misunderstood *Baker* and "routinely fail to recognize that the political question doctrine mainly turns on non-judicial finality").
11. *See id.*

subject matter jurisdiction, when nothing in the Supreme Court's actual practice requires it.[12] Professor Harrison thus finds considerable over-application of the political question doctrine by lower federal courts, and he contends that these dismissals permit lawlessness and thwart accountability, particularly in the foreign affairs context.[13]

There is much to unpack in *The Political Question Doctrines*, and this Response focuses in on three points: (1) the subdivision of the Supreme Court's political question applications into two branches, non-judicial finality and limitations on prospective relief;[14] (2) the claim that the Supreme Court has never treated the political question doctrine as a limitation on subject matter jurisdiction;[15] and (3) the assumed disconnect between the political question doctrine as the Supreme Court sees it and the political question doctrine as it is playing out in many lower federal courts.[16]

I. THE TWO BRANCHES

The political question doctrine had its origins in Chief Justice Marshall's opinion in *Marbury v. Madison*,[17] which explained that certain executive acts are by their nature political and answerable by means of political processes, rather than by judicial examination.[18] Nearly half a century later, the Court sidestepped a feud between rival Rhode Island governments, holding that Congress, not the courts, had power to recognize the legitimacy of a state government.[19] The Supreme Court has deployed the doctrine on only very few occasions since, leaving scholars and lower courts with scattered tea leaves to guess at its scope

12. *See id.* at 520.
13. *See id.* at 527–28.
14. *See infra* Section I and accompanying text.
15. *See infra* Section II and accompanying text.
16. *See infra* Section III and accompanying text.
17. 5 U.S. (1 Cranch) 137 (1803).
18. *See id.* at 166.
19. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). Although some read *Luther* expansively to suggest that Guarantee Clause claims present non-justiciable political questions, any suggestion of that broad holding in the case was dicta because plaintiffs had not challenged the government under that constitutional provision. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1928 (2015). The Court did not definitively establish the non-justiciability of Guarantee Clause claims until 1912 in *Pacific States Telephone & Telegraph Co. v. Oregon*. *See* 223 U.S. 118, 149 (1912).

or theoretical provenance.[20] In a famous back-and-forth, Professors Wechsler and Bickel debated whether the doctrine ought to be invoked only in the rare case of a demonstrable textual commitment of exclusive authority to another branch—the Wechsler view[21]—or oft-employed whenever, in their discretion, judges believe that expedience or concern for institutional legitimacy might require it—the Bickelian counterargument.[22] The six factors laid out in *Baker v. Carr*[23] incorporated elements of each of these seemingly opposed views, leaving subsequent courts no clear roadmap as to how or on what basis to proceed.[24] In his seminal article, *Is There a 'Political Question' Doctrine?*,[25] Professor Louis Henkin questioned the existence of a separate political question

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20. *See generally* Grove, *supra* note 19, at 1910 (noting that scholars "have strongly disputed the nature, scope, and wisdom of the doctrine"); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 99 (1988) (noting broad disagreement over whether the doctrine exists at all or whether it exists but should not). Many commentators have attempted to slice and dice the doctrine into component parts. *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, 247–63 (2002) (describing development of Wechsler's "classical" and Bickel's "prudential" formulations of the doctrine); Chris Michel, Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of* Zivotofsky v. Clinton, 123 YALE L.J. 253, 255–56 (2013) (discussing coalescence of political questions into "two primary categories" of textually demonstrable commitments to other branches and claims that lack judicially manageable standards).

21. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–8 (1959).

22. *See* Alexander M. Bickel, *The Supreme Court, 1960 Term–Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961); *see also* Barkow, *supra* note 20, at 261–62 (describing Bickel's belief in the benefits of the "prudential political question doctrine").

23. 369 U.S. 186, 217 (1962). The six factors are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

24. *See* Zivotofsky ex rel. v. Clinton (Zivotofsky I), 566 U.S. 189, 202 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (observing that "the proper application of *Baker*'s six factors has generated substantial confusion in the lower courts"); *see also* Mulhern, *supra* note 20, at 163 (arguing that the criteria in *Baker* "seem hopelessly inadequate for the task of distinguishing between cases courts should dismiss on political question grounds and cases for which judicial review is routine").

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

doctrine at all.[26] He noted that prior cases had not, in fact, given "extra-ordinary deference" to political branches but rather had asked whether the political branches had acted within approved boundaries and in abidance with prescribed limits.[27] The vacillating fortunes of the political question doctrine have led some commentators to declare the doctrine dead;[28] others, however, fervently insist that it lives on.[29]

Given the murky and contested underpinnings of the doctrine, at least as applied to constitutional questions, it seems at first blush surprising when Professor Harrison labels the Supreme Court's political question cases "orderly,"[30] but he goes on to make a descriptive case. He looks in depth at eight cases in which the Court refused to adjudicate a constitutional question on the ground that it presented a political question and calls six of them "non-judicial finality" cases[31] and two of them cases in which the Court refused entry of prospective relief that might intrude too much upon policy-making.[32]

The "non-judicial finality" cases that Harrison canvasses fit neatly into his paradigm.[33] Frequently, the Court has employed words either

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26. *See id.* at 622.

27. *Id.* at 608.

28. *See, e.g.*, Barkow, *supra* note 20, at 240 (pointing out the recent "demise" of the political question doctrine); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1459 (2005) (noting, after *Bush v. Gore*, many scholars' conclusions that the doctrine is in serious decline "if not fully expired"); Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & POL. 427, 459 (2014) (noting that the Court's consistent recent rejection of the doctrine "raises significant questions about whether the doctrine continues to exist at all"); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1229 (2002) (finding significance in the Court's failure to consider the political question doctrine in *Bush v. Gore*).

29. *See, e.g.*, Mulhern, *supra* note 20, at 162 (noting that the political question doctrine's critics "have failed to make out a case for abandoning the doctrine"); Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 726 (2016) (arguing that the classical political question doctrine articulates a principled limit to judicial power).

30. *See* Harrison, *supra* note 1, at 458.

31. In addition to *Luther*, Harrison classifies the following cases as non-judicial finality cases: Nixon v. United States, 506 U.S. 224 (1993); Roudebush v. Hartke, 405 U.S. 15 (1972); Coleman v. Miller, 307 U.S. 433 (1939); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912); and Field v. Clark, 143 U.S. 649 (1892). *See* Harrison, *supra* note 1, at 465–81.

32. Harrison classifies the following cases as remedy cases: *Gilligan v. Morgan*, 413 U.S. 1 (1973); and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866). *See* Harrison, *supra* note 1, at 481, 484.

33. *See supra* note 31 and accompanying text.

suggesting exclusive power in congressional hands or underscoring the absence of power in judicial hands.[34] Thus, the *Luther v. Borden*[35] Court stated that the right to decide which amongst two rival state governments is established lies with Congress "and not in the courts."[36] In *Field v. Clark*,[37] the Court refused a challenge to the mode of enactment of a statute on the basis that "these and like matters were left to the discretion of the respective houses of Congress."[38] The Court in *Pacific States Telephone & Telegraph Co. v. Oregon*[39] held that Guarantee Clause claims are "solely committed by the Constitution to the judgment of Congress."[40] Although *Coleman v. Miller*[41] had no majority opinion, the opinion of Chief Justice Hughes—for three—that "ultimate authority" over ratifications rests with Congress,[42] and the concurring opinion of Justice Black—for four—that congressional judgments are "conclusive upon the courts,"[43] amply support the classification. The *Roudebush v. Hartke*[44] Court plainly stated that which of two candidates may be seated in Congress is a question "that would not have been the business of this Court."[45] Finally, in *Nixon v. United States*,[46] the Court found that the Constitution's use of the word "sole" vested in the Senate alone the authority to try impeachments and deprived the judiciary of "any role."[47]

So, too, the two cases cited for the proposition that the political question doctrine has purchase when the Court is asked to grant prospective relief that intrudes too much upon the policy-making authority of other actors can fit within Professor Harrison's descriptive model. In *Gilligan v. Morgan*,[48] the Court rejected the invitation to wade into the business of training and controlling the National Guard

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34. *See Nixon*, 506 U.S. at 233; *Roudebush*, 405 U.S. at 19; *Coleman*, 307 U.S. at 450; *Pac. States Tel. & Tel. Co.*, 223 U.S. at 113; *Field*, 143 U.S. at 671; *Luther*, 48 U.S. (7 How.) at 42.
35. 48 U.S. (7 How.) 1 (1849).
36. *Id.* at 42.
37. 143 U.S. 649 (1892).
38. *Id.* at 671.
39. 223 U.S. 118 (1912).
40. *Id.* at 133.
41. 307 U.S. 433 (1939).
42. *Id.* at 450.
43. *Id.* at 457 (Black, J., concurring) (internal quotations omitted).
44. 405 U.S. 15 (1972).
45. *Id.* at 19.
46. 506 U.S. 224 (1993).
47. *Id.* at 233–34.
48. 413 U.S. 1 (1973).

after the incident at Kent State University, finding such policy-making decisions "subject *always*" to the "civilian control of the Legislative and Executive branches."[49] In this respect, although the plaintiffs sought a different remedy, the analysis in *Gilligan* may well have found a home in the prior paragraph.[50] The Court eschewed a role in making difficult policy choices primarily *because* such choices were soundly within the discretion of coordinate branches and not meted out to the judiciary by the Constitution.[51] *Mississippi v. Johnson*[52] fits similarly into the "intrusive prospective remedy" category, but it, too, focused in on the fact that judges may not interfere "with the exercise of Executive discretion."[53]

The two branches Professor Harrison identifies descriptively obviously have a lot in common analytically. Both start with a presumed textual commitment to non-judicial actors. The "non-judicial finality" cases generally take a decision already rendered by a coordinate branch and accept it as valid and binding.[54] Implicitly, these cases find that the non-judicial actors both have considerable discretion to act and have worked within their prescribed boundaries.[55] The "intrusive prospective remedy" cases suggest that the judiciary should not jump into these areas of considerable discretion and choose amongst policy options better suited for a coordinate branch actor; they, too, leave open the possibility of a judicial role if the coordinate branch actor ultimately acts and transgresses its boundaries.[56] At the end of the day, Professor

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49. *Id.* at 10.

50. *See id.* at 11–12. Professor Henkin saw *Gilligan* as a proper exercise of equitable discretion to withhold requested relief. *See* Henkin, *supra* note 25, at 621–22.

51. *See Gilligan*, 413 U.S. at 10. As Professor Harrison notes, however, while the Court was reluctant to enter injunctive relief, it permitted a damages action arising out of the events at Kent State subsequently in *Scheuer v. Rhodes*. *See* Harrison, *supra* note 1, at 483 (citing Scheuer v. Rhodes, 416 U.S. 232 (1974)).

52. 71 U.S. (4 Wall.) 475 (1866).

53. *Id.* at 499.

54. *See supra* notes 35–47 and accompanying text.

55. Although the majority opinion in *Nixon* viewed the Senate discretion to "try" impeachments very broadly, Justice Souter's concurrence in the judgment makes this point concretely: while the Senate has authority, within "broad boundaries" that it did not exceed in that case, to "try" impeachments, the Court could step in when the Senate exceeded that authority, for example by employing a "coin toss." Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring in the judgment). The majority opinion is not inconsistent with this approach; it simply holds that the Senate has unfettered discretion to define the word "try" and thus that the Senate did not transgress any limits. *See id.* at 238.

56. *See* Harrison, *supra* note 1, at 482–83 (noting that, despite the Court's reluctance to enter prospective relief in *Gilligan*, the Court reserved the right to assess unlawful military conduct in the context of a damages action).

Harrison's categories are descriptively accurate, and his atomistic approach may be useful for his subsequent point about how the conclusion of a political question has played out in the Supreme Court.[57] However, these two branches seem to be manifestations of a consistent framework of judicial respect for discretion, coupled with policing of the boundaries of that discretion.

It does bear mention, though, that a near-miss political question holding might have presented challenges for Professor Harrison's orderly framework. In *Goldwater v. Carter*,[58] Senator Barry Goldwater challenged President Carter's unilateral decision to recognize the People's Republic of China, which required nullification of the Sino-American Mutual Defense Treaty signed with Taiwan.[59] The Supreme Court granted certiorari, heard argument, and issued a terse opinion vacating and remanding with instructions to dismiss the complaint.[60] Then-Associate Justice Rehnquist filed a statement concurring in the judgment for himself and three other justices arguing that the case presented a non-justiciable political question.[61] There was no demonstrable textual commitment of authority to a non-judicial actor; the Constitution was silent as to which branch could abrogate a treaty.[62] Despite this, Justice Rehnquist claimed the delicate foreign affairs context called for "political standards," not judicial ones, and said the Court should not set "in concrete" a resolution of the complicated question.[63] Per Justice Rehnquist, the appropriate action was to remand with instructions to dismiss the complaint.[64] He reasoned that "the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy."[65] This position commanded four votes and elicited opposition in separate statements by Justices Powell and Brennan. Justice Powell rejected application of the political question doctrine because the Constitution had not clearly committed treaty termination authority "to the President

57. *See id.* at 460.

58. 444 U.S. 996 (1979).

59. The terse Supreme Court decision does not recount the facts, so this background hails from the decision of the en banc court of appeals. *See* Goldwater v. Carter, 617 F.2d 697, 699–700 (D.C. Cir. 1979) (en banc).

60. *Goldwater*, 444 U.S. at 996.

61. *Id.* at 1002 (Rehnquist, J., concurring in the judgment).

62. *Id.* at 1003.

63. *Id.* at 1003, 1004–05 n.1.

64. *Id.* at 1005–06.

65. *Id.* at 1006.

alone."[66] Justice Brennan, who reached the merits, charged Justice Rehnquist with "profoundly misapprehend[ing] the political-question principle as it applies to matters of foreign relations."[67]

Obviously, a miss is as good as a mile, and Justice Rehnquist failed to win that last vote. Still, the fact that four justices were prepared to sign off on a conception of the political question doctrine that has seemingly little to do with textually demonstrable "non-judicial finality" or "intrusive prospective remedies" makes the doctrine seem a little less orderly, or at least makes whatever order one can superimpose seem a little contingent.

II. ARTICLE III ANTECEDENTS OF THE POLITICAL QUESTION DOCTRINE

A central thesis of Professor Harrison's article is that the Supreme Court has never regarded the political question doctrine as a limitation on the jurisdiction of Article III courts.[68] In "non-judicial finality" cases, the Court has incorporated the non-judicial actor's application of law to fact into its decisions and adjudicated the cases on the merits.[69] For example, in *Luther*, the Court accepted the non-judicial actor's recognition of the legitimate Rhode Island government and used that conclusion to reject the plaintiff's claim for damages.[70] In prospective relief cases, the Court has exercised its equitable discretion to withhold injunctive relief.[71] In neither context has the Court remanded with instructions to dismiss for want of subject matter jurisdiction. This is a complex and interesting point, and again, Professor Harrison may be descriptively accurate that no Supreme Court case has *actually held* that the political question doctrine has a grounding in Article III.[72] Then-Associate Justice Rehnquist certainly intended to go there in *Goldwater v. Carter*,[73] but again, his opinion commanded only four votes.

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66. *Id.* at 999 (Powell, J., concurring in the judgment).
67. *Id.* at 1006 (Brennan, J., dissenting).
68. *See* Harrison, *supra* note 1, at 458.
69. *See id.* at 486–87.
70. *Id.* at 486; *see also* Luther v. Borden, 48 U.S. (7 How.) 1, 47 (1849).
71. *See* Harrison, *supra* note 1, at 487–92.
72. *Id.* at 486; *see also* Skinner, *supra* note 28, at 452 (explaining the Supreme Court has "never found a case to be truly nonjusticiable based on the 'political question doctrine,' and it certainly has never found an individual claim for damages nonjusticiable under the doctrine").
73. *See* Goldwater v. Carter, 444 U.S. 996, 1005–06 (1979) (Rehnquist, J., concurring in the judgment).

Much turns on the distinction between holding and dicta, though, and lower courts might be forgiven for their confusion on this particular point. As recently as 2006, a unanimous Court stated that "[t]he doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."[74] In that case, *DaimlerChrysler Corp. v. Cuno*,[75] the Court rejected the argument that a plaintiff who had standing with respect to one claim could assert supplemental standing with respect to other, closely related claims.[76] The Court noted, in so doing, that the plaintiff's argument would have "remarkable implications": if permitted, "a federal court would be free to entertain moot or unripe claims, or claims presenting a political question."[77] The *DaimlerChrysler* Court cited *Schlesinger v. Reservists Committee*,[78] which had grounded the political question doctrine in Article III and stated that "the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party."[79] In *Schlesinger*, the Court's conclusion that the plaintiffs lacked standing kept it from deciding the political question issue,[80] so again, its treatment of the political question doctrine was dictum.[81] *Schlesinger* in turn cited *Flast v. Cohen*,[82] which described the Article III "case" or "controversy" requirement as having "an iceberg quality," containing "submerged complexities which go to the very heart of our constitutional form of government."[83] "Thus," the *Flast* Court continued, "no justiciable controversy is presented when the parties seek adjudication of only a political question."[84] In *Sierra Club v. Morton*,[85] the Court indicated,

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74. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).
75. 547 U.S. 332 (2006).
76. *See id.* at 352.
77. *Id.*
78. 418 U.S. 208 (1974).
79. *Id.* at 215.
80. *Id.* at 215–16.
81. *See id.* at 214–16 (holding that the denial of standing "eliminate[d] the need to consider" the political question issue).
82. 392 U.S. 83 (1968).
83. *Id.* at 94.
84. *Id.* at 95. In *Zivotofsky v. Clinton*, the lower courts had concluded the recognition issue raised a non-justiciable political question and dismissed for want of subject matter jurisdiction. 566 U.S. 189, 193–94 (2012). The Supreme Court reversed on the basis that the issue did not, in fact, raise a political question but did not take issue with the lower courts' assumption that political questions are nonjusticiable and merit dismissal. *See id.* at 201–02.
85. 405 U.S. 727 (1972).

again in passing, that resolution of political questions is "inconsistent with the judicial function under Art. III."[86]

Professor Harrison buttresses his point by noting that "the political question doctrine generally applies in state court"[87] and reasons that, because state courts are not subject to the limitations of Article III, the political question doctrine therefore must lack a basis in Article III.[88] The Guarantee Clause cases certainly support the idea that such issues are exclusively within Congress's bailiwick and are unsuitable for resolution in federal *or* state court.[89] However, these cases lack much by way of reasoning, and Justice Rehnquist's plurality in *Goldwater v. Carter*[90] stated that "[t]his Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot . . . so long as they do not trench upon exclusively federal questions of foreign policy."[91] It may be that singular features of the Guarantee Clause cases—like the fact that they represent challenges to the legitimacy of state government—bring them within the ambit of "exclusively federal questions" like those anticipated by Justice Rehnquist.[92] Outside of the Guarantee Clause context, there do not appear to be any cases that suggest or assume that the political question doctrine binds state courts.[93]

At day's end, Professor Harrison definitely has unearthed a fascinating disconnect between what the Supreme Court has tended to

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86. *Id.* at 732 n.3.

87. Harrison, *supra* note 1, at 497.

88. *See id.* (noting that state courts are barred from "interfer[ing] with the political discretion of federal political actors," even though they operate outside the jurisdictional confines of Article III).

89. *See supra* notes 39–40 and accompanying text.

90. 444 U.S. 996 (1979).

91. *Id.* at 1005 n.2 (Rehnquist, J., concurring in the judgment) (citation omitted).

92. *Id.*

93. Some state courts have recognized a variant of the political question doctrine in their own constitutions. *See, e.g.*, Lobato v. Colorado, 218 P.3d 358, 368 (Colo. 2009) (en banc) (recognizing political question doctrine as an emanation of the Colorado Constitution). Several have employed the factors from *Baker v. Carr* to guide their analysis under state law. *See, e.g.*, Kansas Bldg. Indus. Workers Comp. Fund v. Kansas, 359 P.3d 33, 43 (Kan. 2015) ("[W]e will continue to view the political question doctrine through *Baker*'s lens."); Smigiel v. Franchot, 978 A.2d 687, 701 (Md. 2009) (same). Others have expressly noted that the federal political question doctrine does not bind them. *See, e.g.*, Freeman v. Grain Processing Corp., 848 N.W.2d 58, 91 (Iowa 2014) (citing *Goldwater*, 444 U.S. at 1005 n.2 (Rehnquist, J., concurring in the judgment)) ("It is important to note . . . that the United States Supreme Court has made clear that the federal political question doctrine does not apply to state courts.").

say and what it has tended to *do*.[94] The Court has repeatedly characterized the political question doctrine as a species of justiciability doctrine and has hinted, in so doing, that it, like standing or mootness, goes to subject matter jurisdiction. And yet, in the limited data points in which at least five members of the Court have actually found a political question, the Court has not walked the walk.[95] This insight is intriguing and brings to mind Professor Henkin's argument that the Court "needs no special doctrine suggesting a quality of 'nonjusticiability'" in this sphere.[96]

III. LOWER COURTS

Given the Supreme Court's confusing signals, both in what it has said in dicta and in what four Justices were prepared to hold in *Goldwater v. Carter*,[97] a modicum of disarray in the lower federal courts is probably unsurprising. Professor Harrison faults numerous decisions of the courts of appeals for finding non-justiciable, and thereafter dismissing, political questions where non-judicial actors simply have discretion, not final decision-making authority.[98] Whether there is disconnect, obviously, turns on whether he is correct that the political question doctrine has nothing to do with a federal court's subject matter jurisdiction.[99] Descriptively, Professor Harrison certainly is right that the courts of appeal routinely appear to dismiss for want of subject matter jurisdiction and are very willing to invoke the political question doctrine when a claim calls into question executive decision-making in the foreign affairs context, without inquiring whether the executive possesses final decision-making authority.[100]

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94. *See* Harrison, *supra* note 1, at 458 (arguing that the Court has "often lost sight" of its own "orderly" political question doctrine jurisprudence).

95. *See id.* at 486–92.

96. Henkin, *supra* note 25, at 599. At times, it is tempting to see the political question doctrine as smoke and mirrors, its invocation nothing but a veiled merits determination that another branch both has authority to decide and has not transgressed.

97. 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment).

98. *See* Harrison, *supra* note 1, at 518.

99. *Id.* at 528.

100. *See, e.g.*, El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (affirming dismissal of action under the Federal Tort Claims Act after finding it would require court to assess merits of the executive's decision to attack a foreign target); Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271, 1280–83 (11th Cir. 2009) (affirming dismissal of action that might require review of military supply decisions in wartime); Corrie v. Caterpillar, Inc., 503 F.3d 974, 982, 984 (9th Cir. 2007) (affirming dismissal where action might undermine executive policy choices in Israeli-Palestinian conflict).

Is the Supreme Court likely to balk here? *Zivotofsky I* makes clear that the Roberts Court takes the judicial role very seriously, even in an area that touches upon foreign affairs.[101] *Zivotofsky I*, though, presented a conflict among coordinate branches as to *which* got to make a call; it did not ask the Supreme Court to second-guess the call itself.[102] One wonders whether recent cases like *Ziglar v. Abbasi*[103] may not signal that the Supreme Court is increasingly comfortable sidelining itself where suits ask courts to second-guess foreign policy determinations.[104] In *Ziglar*, the Court refused to permit a *Bivens*[105] action by post-September 11 detainees because it would "require courts to interfere in an intrusive way with sensitive functions of the Executive branch."[106] Neither the parties nor the Court mentioned the political question doctrine. But the majority's disinclination to permit a suit that required review of the executive response to the war on terror at least suggests that a majority of the current Court might be sympathetic to the position of then-Associate Justice Rehnquist in *Goldwater v. Carter*.[107] The Court seems all-too-willing to sanction roadblocks to suits in the foreign affairs context,[108] and *Ziglar* suggests a basis for skepticism that a course correction of the lower courts' work in the foreign affairs context will be forthcoming.[109]

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101. Zivotofsky ex rel. v. Clinton, 566 U.S. 189, 196–97 (2012).

102. *See id.* at 196 (emphasizing that federal courts were not asked to substitute the foreign policy decisions of any branch of government with that of the judiciary). Indeed, in *Zivotofsky II*, the Court determined that the President's authority to recognize foreign powers is exclusive, a holding that reinforces a hands-off approach going forward. *See* Zivotofsky ex rel. v. Kerry (Zivotofsky II), 135 S. Ct. 2076, 2087 (2015).

103. 137 S. Ct. 1843 (2017).

104. *See id.* at 1860–61 (cautioning against judicial interference in contexts involving executive "formulation and implementation" of foreign policy).

105. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

106. *Ziglar*, 137 S. Ct. at 1861; *see also* Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

107. The majority's reasoning in *Ziglar* clearly resonates with the language used by Chief Justice Rehnquist in *Goldwater*. *Compare id.* at 1861 (declining to "interfere in an intrusive way with sensitive functions of the Executive Branch"), *with* Goldwater v. Carter, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring in the judgment) (prohibiting state court resolution of questions that "trench upon exclusively federal questions of foreign policy").

108. *See Developments in the Law–Access to Courts: The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1151, 1193 (2009) (observing that the Court has erected numerous obstacles to prevent suits in the foreign relations context).

109. *See Ziglar*, 137 S. Ct. at 1861, 1863 (reiterating that "[n]ational-security policy is the prerogative of the Congress and President" and holding that, in such cases, it is proper to exercise restraint).

CONCLUSION

Professor Harrison's argument is both interesting and intentionally provocative. He looks at what the Supreme Court has actually done and demonstrates that the Court has acted in an orderly, even predictable, way. The Court's many statements that contradict this orderly approach, though, suggest that this semblance of order may be unintentional,[110] and in the foreign affairs context, there is reason to be wary that the Court will be willing to entertain a robust judicial role.[111] Professor Harrison's argument draws its primary normative conclusions from what the Court has actually done to date. Nothing the Court has said, though, seems to preclude it from taking us in another direction in the next case.

110. *See supra* Section II.
111. *See supra* notes 101–109 and accompanying text.