

### H. Political Question Doctrine

*Designation of Passport Applicant's Birthplace.* — The political question doctrine highlights the tension between courts' duty to "say what the law is"<sup>1</sup> and their competence to intervene in sensitive matters.<sup>2</sup> In 1962's *Baker v. Carr*,<sup>3</sup> the Supreme Court named six factors supporting nondecision;<sup>4</sup> however, applying them has proved challenging.<sup>5</sup> Last Term, in *Zivotofsky ex rel. Zivotofsky v. Clinton*,<sup>6</sup> the Court reversed the D.C. Circuit's refusal to hear a claim by an American asking the State Department to list "Israel," instead of simply "Jerusalem," as his birthplace on his passport.<sup>7</sup> Central to the Court's holding was the plaintiff's invoking of a statute; the required inquiry into the law's constitutionality was a "familiar judicial exercise,"<sup>8</sup> not a nonjusticiable political question. The Court was correct that the statute changed the political question analysis, but a broad reading of the case implies that courts must *always* confront the constitutionality of statutory constraints on the Executive. While such a rule might have salutary effects for the rule of law, it would contradict *Baker's* case-by-case approach and risk drawing courts into separation of powers disputes that would be better left undecided. Accordingly, the best reading of *Zivotofsky* may be a narrow one.

Menachem Zivotofsky was born in Jerusalem, to American parents, in 2002.<sup>9</sup> When his mother requested that his U.S. passport list his birthplace as "Israel," the State Department refused and listed simply "Jerusalem," consistent with its decades-old policy of not acknowledging any state's sovereignty over the city.<sup>10</sup> In 2003, Zivotofsky

<sup>1</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>2</sup> *See, e.g., Alexander M. Bickel, The Least Dangerous Branch* 186–87 (1962).

<sup>3</sup> 369 U.S. 186 (1962).

<sup>4</sup> The six factors were:

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

*Id.* at 217.

<sup>5</sup> *See, e.g., Doe v. Bush*, 323 F.3d 133, 140 (1st Cir. 2003) (calling the doctrine "famously murky"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring) ("murky and unsettled"); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031 (1985) ("an enigma").

<sup>6</sup> 132 S. Ct. 1421 (2012).

<sup>7</sup> *Id.* at 1424–25.

<sup>8</sup> *Id.* at 1427.

<sup>9</sup> *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 511 F. Supp. 2d 97, 99 (D.D.C. 2007).

<sup>10</sup> *Id.* at 99–100.

(through his parents) sued the Secretary of State in federal district court, seeking to enforce section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003.<sup>11</sup> That provision commands the State Department to list a Jerusalem-born passport applicant's birthplace as "Israel" upon request.<sup>12</sup> The district court dismissed Zivotofsky's claim on the grounds that he lacked standing and that his claim, in implicating the President's power to recognize foreign governments, presented a political question.<sup>13</sup> The D.C. Circuit reversed on standing and remanded for more factual development on the political question issue.<sup>14</sup> The district court again dismissed the claim as presenting a political question,<sup>15</sup> and Zivotofsky appealed.

The D.C. Circuit affirmed.<sup>16</sup> Writing for the panel, Judge Griffith<sup>17</sup> explained that "courts may not consider claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution."<sup>18</sup> It is "well established," he noted, that the Constitution grants the President the sole power to recognize foreign governments.<sup>19</sup> And because Zivotofsky's claim asked the court to contradict the President's neutral stance toward Jerusalem, it was nonjusticiable.<sup>20</sup> In Judge Griffith's view, section 214(d) was "of no moment" to the analysis;<sup>21</sup> while he suggested that the statute would be unconstitutional were the court to reach the question,<sup>22</sup> justiciability was a threshold matter.<sup>23</sup> Judge Edwards concurred, though he objected to the majority's political question holding.<sup>24</sup> In his view, the relevant question was whether section 214(d) was constitutional; he would have reached the merits and struck down the law.<sup>25</sup>

<sup>11</sup> Pub. L. No. 107-228, 116 Stat. 1350 (2002); see *Zivotofsky*, 511 F. Supp. 2d at 100-01.

<sup>12</sup> § 214(d), 116 Stat. at 1366. President Bush issued a signing statement objecting to this provision as "interfer[ing] with the President's constitutional authority to conduct the Nation's foreign affairs." Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658, 1659 (Sept. 30, 2002).

<sup>13</sup> *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, Nos. 03-1921, 03-2048, 2004 WL 5835212, at \*3 (D.D.C. Sept. 7, 2004).

<sup>14</sup> *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 619, 620 (D.C. Cir. 2006).

<sup>15</sup> *Zivotofsky*, 511 F. Supp. 2d at 107.

<sup>16</sup> *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1233 (D.C. Cir. 2009).

<sup>17</sup> Judge Griffith was joined by Judge Williams.

<sup>18</sup> *Zivotofsky*, 571 F.3d at 1230 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>19</sup> *Id.* at 1231.

<sup>20</sup> *Id.* at 1231-32.

<sup>21</sup> *Id.* at 1233.

<sup>22</sup> *Id.* at 1232 (stating that "the Executive — not Congress and not the courts — has the power" to determine and implement national policy on Jerusalem's status).

<sup>23</sup> *Id.* at 1230.

<sup>24</sup> See *id.* at 1234 (Edwards, J., concurring).

<sup>25</sup> See *id.* at 1234, 1240.

The Supreme Court vacated and remanded.<sup>26</sup> Writing for the Court, Chief Justice Roberts<sup>27</sup> described the political question doctrine as a “narrow exception” to a federal court’s duty to “decide cases properly before it.”<sup>28</sup> The exception, he explained, applies to cases involving “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>29</sup> Chief Justice Roberts concluded that Zivotofsky’s case satisfied neither test.

First, the Constitution did not commit the issue to another branch. The relevant question, in the Chief Justice’s view, was not “whether Jerusalem is the capital of Israel,” but rather whether Zivotofsky “may vindicate his statutory right . . . to have Israel recorded on his passport.”<sup>30</sup> That question presented the “familiar judicial exercise” of interpreting section 214(d) and deciding whether it was constitutional.<sup>31</sup> And even assuming that the recognition power was the President’s alone, the Constitution did not commit to the Executive “the power to determine the constitutionality of a statute.”<sup>32</sup> Instead, that category of question has for centuries been “emphatically the province and duty of the judicial department.”<sup>33</sup> That duty may have political implications, Chief Justice Roberts conceded, but the judiciary nevertheless has a “responsibility” to adjudicate such conflicts when they arise.<sup>34</sup>

Second, Chief Justice Roberts denied that a standard was unavailable for resolving the case. He recited the parties’ competing claims regarding the political branches’ power over passports.<sup>35</sup> Resolving them, he argued, would involve examining “textual, structural, and historical evidence” concerning statutory and constitutional provisions; as he put it, “[t]his is what courts do.”<sup>36</sup> Accordingly, he concluded, Zivotofsky’s case did not present a nonjusticiable political question.<sup>37</sup> Because the lower courts had dismissed the case on political question grounds, the Court remanded the constitutional question to the district court,<sup>38</sup> despite having ordered briefing and argument on it.<sup>39</sup>

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<sup>26</sup> *Zivotofsky*, 132 S. Ct. at 1431.

<sup>27</sup> The Chief Justice was joined by Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan.

<sup>28</sup> *Zivotofsky*, 132 S. Ct. at 1427.

<sup>29</sup> *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). This language mirrors the first two *Baker* factors. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>30</sup> *Zivotofsky*, 132 S. Ct. at 1427.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1428.

<sup>33</sup> *Id.* at 1427–28 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>34</sup> *Id.* at 1428.

<sup>35</sup> *Id.* at 1428–30.

<sup>36</sup> *Id.* at 1430.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *M.B.Z. ex rel. Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011) (granting certiorari).

Justice Sotomayor concurred in part and concurred in the judgment, advancing a “more demanding” analysis.<sup>40</sup> She organized the six *Baker* factors around “three distinct justifications”: courts “lack[] authority” to decide factor-one cases, cases implicating factors two and three require “decisionmaking beyond courts’ competence,” and factors four through six involve prudential considerations.<sup>41</sup> While the last three factors would control only rarely, she argued that abstention in “unusual cases” was appropriate for common law courts.<sup>42</sup> Turning to the case itself, Justice Sotomayor agreed that the relevant question, section 214(d)’s constitutionality, fell to the judiciary.<sup>43</sup> But she also hypothesized statutory cases that would present political questions.<sup>44</sup> Finally, she disagreed with the majority’s view that the parties’ arguments — “textual, structural, and historical” — were inconsistent with a political question holding; *Nixon v. United States*,<sup>45</sup> which the Court dismissed on political question grounds, involved similar arguments.<sup>46</sup>

Justice Alito concurred in the judgment, emphasizing that the question presented was “narrow,” involving the power “to regulate the contents of a passport,” not whether the power to recognize foreign governments is exclusively the President’s.<sup>47</sup> He noted that Congress has the power to regulate immigration, naturalization, and foreign commerce, but that the President also has broad foreign affairs powers.<sup>48</sup> He concluded that resolving section 214(d)’s constitutionality was “not an easy matter,” but agreed with the majority that it was justiciable.<sup>49</sup>

Justice Breyer dissented. He joined Justice Sotomayor’s explication of the political question doctrine, but “[f]our sets of prudential considerations, *taken together*,” convinced him that Zivotofsky’s case was nonjusticiable.<sup>50</sup> First, the case “ar[ose] in the field of foreign affairs.”<sup>51</sup> Second, judges would “have to evaluate the foreign policy implications of foreign policy decisions.”<sup>52</sup> The case’s uncertain impli-

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<sup>40</sup> *Zivotofsky*, 132 S. Ct. at 1431 (Sotomayor, J., concurring in part and concurring in the judgment). Justice Breyer joined Part I of Justice Sotomayor’s opinion.

<sup>41</sup> *Id.* at 1431–32.

<sup>42</sup> *Id.* at 1433.

<sup>43</sup> *Id.* at 1434–35.

<sup>44</sup> *Id.* at 1435.

<sup>45</sup> 506 U.S. 224 (1993).

<sup>46</sup> *Zivotofsky*, 132 S. Ct. at 1435 (Sotomayor, J., concurring in part and concurring in the judgment). *Nixon* dismissed an impeached federal judge’s challenge to the procedures employed by the Senate to convict him. *See Nixon*, 506 U.S. at 226. The Court held that Nixon’s claim presented a nonjusticiable political question because the Constitution placed the Senate’s choice of conviction procedures beyond judicial review. *See id.* at 237–38.

<sup>47</sup> *Zivotofsky*, 132 S. Ct. at 1436 (Alito, J., concurring in the judgment).

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* at 1436–37.

<sup>50</sup> *Id.* at 1437 (Breyer, J., dissenting).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1438.

cations for the Middle East made interference risky.<sup>53</sup> Third, he did not view Zivotofsky's claim as involving a particularly weighty interest.<sup>54</sup> Finally, the other branches "have nonjudicial methods of working out their differences."<sup>55</sup> Noting his view that the political question doctrine turns on "how importunately the occasion demands an answer," Justice Breyer concluded that an answer was unnecessary.<sup>56</sup>

The political question doctrine comprises both a "classical" component, which forbids courts from considering matters constitutionally committed to other branches, and a "prudential" one, which courts invoke to avoid deciding certain difficult or controversial cases.<sup>57</sup> In *Zivotofsky*, the Court aligned the D.C. Circuit's classical jurisprudence with the basic principle that executive and legislative power are interdependent. But read broadly, *Zivotofsky* also suggests that an entire category of cases — ones in which a plaintiff invokes a statutory constraint on the Executive — is inherently justiciable. Such a rule, if adopted explicitly, would contradict *Baker*'s case-by-case approach and lead future courts to intervene even where manageable standards are lacking or where judicial involvement would be particularly risky. The best available reading of *Zivotofsky* is thus a narrow one.

The Court's disagreement with the D.C. Circuit turned on the first *Baker* factor: whether Zivotofsky's claim involved "a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>58</sup> The circuit court began by examining the power that the claim called into question, concluding that the State Department's passport policy was an unreviewable exercise of the President's exclusive recognition power;<sup>59</sup> it assumed that that conclusion rendered redundant an inquiry into section 214(d)'s constitutionality.<sup>60</sup> The Supreme Court, by contrast, began from a different premise: Zivotofsky had invoked a statutory right, and the judiciary's duty to decide whether statutes are valid extends even to "political" cases.<sup>61</sup>

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<sup>53</sup> See *id.* at 1439–40.

<sup>54</sup> *Id.* at 1440.

<sup>55</sup> *Id.* at 1441.

<sup>56</sup> *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring in the judgment)) (internal quotation marks omitted).

<sup>57</sup> 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 & n.24, 253 (2002); Recent Case, 124 HARV. L. REV. 640, 643, 644 (2010) (discussing *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc)); see also *Zivotofsky*, 132 S. Ct. at 1431–33 (Sotomayor, J., concurring in part and concurring in the judgment); *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment).

<sup>58</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>59</sup> See *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009).

<sup>60</sup> See *id.* at 1232.

<sup>61</sup> *Zivotofsky*, 132 S. Ct. at 1427–28.

The Court's reasoning was fairly conclusory. For one thing, while statutory and constitutional interpretation are "familiar judicial exercise[s],"<sup>62</sup> the political question doctrine specifically comprises cases in which the judiciary declines to hear claims that it otherwise would.<sup>63</sup> More fundamentally, the Court never thoroughly justified its premise that section 214(d)'s constitutionality was the relevant question. In nonstatutory cases, the Court's analysis has sometimes mirrored the D.C. Circuit's, examining the relevant power first to determine whether its exercise is insulated from judicial review.<sup>64</sup> The Court did not explain why that framework was improper here, or, put differently, why the statute's presence required the courts to confront its validity.

For a more coherent rationale, the Court could have drawn on basic separation of powers law. The scope of the President's powers cannot be specified in a vacuum — a principle authoritatively expressed by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>65</sup> Even the scope of an exclusive presidential power may depend on Congress's exercise of its own powers.<sup>66</sup> Thus, the D.C. Circuit could not assume that section 214(d) was irrelevant to whether the passport policy was an unreviewable exercise of the recognition power. A political question analysis requires careful scrutiny of the constitutional provisions at issue,<sup>67</sup> and because executive and legislative power are interdependent, whether an issue is committed to the Executive cannot be determined without examining both Article II and Article I.

Given the importance of the political question doctrine in the D.C. Circuit's case law,<sup>68</sup> the Court's intervention is significant. It may not alter the fate of Zivotofsky's passport: the circuit court clearly had determined that Congress could not define the State Department's poli-

<sup>62</sup> *Id.* at 1427.

<sup>63</sup> *See id.*

<sup>64</sup> *See, e.g., Powell v. McCormack*, 395 U.S. 486, 519 (1969) ("[W]e must first determine what power the Constitution confers upon the House [of Representatives] . . . before we can determine to what extent, if any, the exercise of that power is subject to judicial review.").

<sup>65</sup> 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *see also, e.g., Medellín v. Texas*, 552 U.S. 491, 524 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

<sup>66</sup> For example, while the Commander in Chief Clause, U.S. CONST. art. II, § 2, cl. 1, contemplates the President's having authority over some aspects of military decisionmaking, Congress's own war powers, *id.* art. I, § 8, cls. 11–14, may constrain that authority. *See, e.g., Hamdan*, 548 U.S. at 592–93; *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804). At the same time, the President's authority is broader when Congress has not acted than when it has. *See, e.g., Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863); *cf. Dames & Moore*, 453 U.S. at 679–88 (holding that the President may settle claims with foreign nations given a pattern of congressional acquiescence). *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (discussing Congress's ability to constrain the President's Commander-in-Chief power).

<sup>67</sup> *See Nixon v. United States*, 506 U.S. 224, 228 (1993).

<sup>68</sup> *See* Recent Case, *supra* note 57, at 640 & n.3.

cy.<sup>69</sup> But *Zivotofsky* will matter most where the division of authority between the political branches is less certain. The D.C. Circuit’s political question cases have asked only whether the relevant power belongs to “the political branches to the exclusion of the judiciary,” without regard to how the Constitution allocates the power *between* the President and Congress.<sup>70</sup> That approach leaves the allocation of the contested power to the political arena, furnishing the President with broad discretion over areas in which the Constitution envisions a role for Congress as well.<sup>71</sup> Such a hands-off approach finds some support in older cases,<sup>72</sup> but *Zivotofsky* instructs the judiciary to give effect to valid constraints on executive power, helping to preserve “the equilibrium established by our constitutional system.”<sup>73</sup>

However, as the Court was correcting the D.C. Circuit’s “classical” approach, it was also dealing a blow to the doctrine’s prudential strand. *Zivotofsky* can be read to suggest that courts must *always* confront the constitutionality of statutory limits on the Executive — a bright-line rule at odds with the “case-by-case” nature of the political question doctrine.<sup>74</sup> First, the case holds that when a plaintiff invokes a statutory limit on the Executive, the relevant question is the statute’s constitutionality; that question will never lie with another branch.<sup>75</sup> Second, by suggesting that analysis of statutory and constitutional text,

<sup>69</sup> See *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1232 (D.C. Cir. 2009).

<sup>70</sup> *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (quoting *Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989) (opinion of Sentelle, J.)) (internal quotation mark omitted); see, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840–44 (D.C. Cir. 2010) (en banc); *Zivotofsky*, 571 F.3d at 1230; *Schneider*, 412 F.3d at 194–96.

<sup>71</sup> Congress may lack the resources to effectuate its constitutionally assigned role unless the courts enforce its directions to the Executive. See *El-Shifa*, 607 F.3d at 857 (Kavanaugh, J., concurring in the judgment); Barron & Lederman, *supra* note 66, at 723–24; Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 239–40 (1985). But see *Zivotofsky*, 132 S. Ct. at 1441 (Breyer, J., dissenting) (suggesting that the political branches have nonjudicial means of resolving their disputes).

<sup>72</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (arguing that several congressmen’s challenge to President Carter’s termination of a treaty was nonjusticiable because it “involve[d] the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President”); cf. Champlin & Schwarz, *supra* note 71, at 215–16.

<sup>73</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

<sup>74</sup> *Baker v. Carr*, 369 U.S. 186, 210–11 (1962); accord *BICKEL*, *supra* note 2, at 186.

<sup>75</sup> See *Zivotofsky*, 132 S. Ct. at 1427–28. At least with respect to interbranch disputes, *Zivotofsky* is inconsistent with the view that the political question doctrine grants “interpretive authority” to other branches. Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 444 (2004); see Barkow, *supra* note 57, at 239–40. On that view, the first step in the Court’s analysis would be determining the scope of the recognition power committed to the Executive; within that scope, the Executive would have the power to “interpret” the Constitution by ignoring statutory constraints. See Barkow, *supra* note 57, at 239. But that approach resembles the D.C. Circuit’s, which the Court rejected.

structure, and history is “what courts do,”<sup>76</sup> the Court seemed to doubt whether a manageable standard would ever be lacking in a case turning on a statute’s constitutionality.<sup>77</sup> Third, the Court jettisoned the last four *Baker* factors,<sup>78</sup> appearing to eliminate alternative bases for nondecision where statutory constraints on the Executive are invoked. So while the Court never said so outright, a broad reading of *Zivotofsky* suggests that such claims are inherently justiciable.

But the Court left that suggestion implicit, and there are reasons to confine its sweeping language to the case before it. First, it is unlikely that manageable standards are categorically more likely in cases like *Zivotofsky* than in other kinds of cases; vague constitutional provisions do not become clearer simply because the plaintiff invokes a statute.<sup>79</sup> As Justice Sotomayor noted, the fact that the litigants relied on arguments “common to judicial consideration” did not inevitably render a manageable standard available; it is more sensible to consider whether the evidence *in a given case* yields a basis for principled adjudication.<sup>80</sup> For example, the Court has refused, for lack of standards, to decide political gerrymandering claims under the Equal Protection Clause,<sup>81</sup> despite its willingness to adjudicate other varieties of claims under the same provision.<sup>82</sup> The majority neither adopted explicitly a categorical analysis nor responded to Justice Sotomayor, suggesting that a contextual approach to manageable standards survives intact.

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<sup>76</sup> *Zivotofsky*, 132 S. Ct. at 1430.

<sup>77</sup> See *id.* at 1435 (Sotomayor, J., concurring in part and concurring in the judgment) (objecting to this part of the majority’s opinion).

<sup>78</sup> While the *Nixon* Court quoted only the first two *Baker* factors, it *found* a political question, making recourse to other factors unnecessary. See *Nixon v. United States*, 506 U.S. 224, 228, 237–38 (1993). And it also cited prudential concerns. See *id.* at 236 (noting that allowing a claim like *Nixon*’s to proceed would lead to political uncertainty, most notably if the President were ever impeached). Moreover, a plurality of the Court has suggested that all six *Baker* factors survived *Nixon*. See *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (plurality opinion).

<sup>79</sup> In *Zivotofsky*, for example, section 214(d)’s text was clear. But the constitutional question involved the recognition power, which the Court has inferred from the President’s power to “receive Ambassadors and other public Ministers.” U.S. CONST. art. II, § 3; see *United States v. Pink*, 315 U.S. 203, 229–30 (1942); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 220 (2d ed. 1996). How far this unenumerated power extends into the regulation of passports’ contents, particularly in light of Congress’s own powers, is “not an easy matter.” *Zivotofsky*, 132 S. Ct. at 1437 (Alito, J., concurring in the judgment).

<sup>80</sup> *Zivotofsky*, 132 S. Ct. at 1435 (Sotomayor, J., concurring in part and concurring in the judgment); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1285–97 (2006) (exploring criteria for manageable standards).

<sup>81</sup> U.S. CONST. amend. XIV; see *Vieth*, 541 U.S. at 281. The Court also has refused, in part for lack of standards, to adjudicate claims involving the Guarantee Clause, U.S. CONST. art. IV, § 4 (guaranteeing “to every State in this Union a Republican Form of Government”); see, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 41–42 (1849), and the Impeachment Trial Clause, U.S. CONST. art. I, § 3, cl. 6; see *Nixon*, 506 U.S. at 230.

<sup>82</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). For a discussion of the various equal protection standards that the Court uses, see Fallon, *supra* note 80, at 1297–98.

Second, prudential considerations, which the Court did not explicitly eliminate, have served a valuable role in the political question doctrine. A purely “classical” analysis — turning on the judiciary’s authority to resolve categories of questions (such as “the constitutionality of a statute”<sup>83</sup>) — puts significant weight on the distinction between “legal” and “political” reasoning. The Court conceded that deciding “the political status of Jerusalem” might lie beyond its ken.<sup>84</sup> But in a realist sense, it remanded for decision on that very question: at least as far as *passports* are concerned, a win for Zivotofsky would mean Jerusalem is in Israel. The geopolitical effects of that outcome, whatever they may be, are unlikely to depend on how a court describes its reasoning; in any case, judges are ill suited to assess them.<sup>85</sup> To conclude that concerns related to judicial competence “dissipate” as a result of recasting a question as constitutional<sup>86</sup> is to deny that the consequences of a case’s outcome affect whether the judiciary should decide it. That logic contradicts the political question doctrine’s consequentialist impulse: courts typically weigh the “consequences of judicial action,” particularly in cases involving foreign relations.<sup>87</sup>

To be sure, the Court has often remarked that the risks inherent in judicial intervention cannot trump its duty to enforce the law.<sup>88</sup> But whether or not prudential factors should have governed *Zivotofsky*, the limits of its holding will be important in the future. The D.C. Circuit’s pre-*Zivotofsky* approach had the advantage of keeping the judiciary out of many foreign affairs cases. Now, lower courts must decide whether the majority’s sweeping language on manageable standards or its failure to address prudential concerns, in the face of a dissent that found those concerns dispositive,<sup>89</sup> means that claims invoking statuto-

<sup>83</sup> *Zivotofsky*, 132 S. Ct. at 1428.

<sup>84</sup> *Id.*

<sup>85</sup> See *id.* at 1439–40 (Breyer, J., dissenting); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567–73 (1966).

<sup>86</sup> *Zivotofsky*, 132 S. Ct. at 1428.

<sup>87</sup> *Baker v. Carr*, 369 U.S. 186, 211–12 (1962); see *id.* at 212–13 (collecting cases); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (stating that foreign policy decisions are “delicate, complex, and involve large elements of prophecy,” and thus are “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility”); cf. *Luther v. Borden*, 48 U.S. (7 How.) 1, 39 (1849) (refusing to adjudicate a claim under the Guarantee Clause because of potential “results”). See generally 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, 1232 (2002) (justifying “justiciability doctrines” as “tools to avoid harm to [the Court] or to the nation”).

<sup>88</sup> See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). Of course, if such absolutism were the law, the final three *Baker* factors would be aberrant, which the Court has not previously suggested. See *Zivotofsky*, 132 S. Ct. at 1433–34 (Sotomayor, J., concurring in part and concurring in the judgment) (describing when prudential factors may support nondecision); *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion) (describing the *Baker* factors as “six independent tests”).

<sup>89</sup> See *Zivotofsky*, 132 S. Ct. at 1437 (Breyer, J., dissenting).

ry limits on the Executive are inherently justiciable. Given the risks of such a categorical approach, a narrow reading would be appropriate.

To take a prominent example, the War Powers Resolution<sup>90</sup> (WPR) limits the President's authority to conduct military operations without Congress's approval.<sup>91</sup> Every President since its enactment has claimed that it infringes the President's authority as Commander in Chief.<sup>92</sup> While the Court has not confronted the WPR, lower courts often turn to the political question doctrine when the law is invoked, given the thorny questions it raises.<sup>93</sup> Courts anxious to avoid adjudicating the lawfulness of active military operations<sup>94</sup> may read *Zivotofsky* as leaving prudential considerations available or reference those considerations in determining whether a manageable standard exists.<sup>95</sup> And while judicial intervention may be proper in some WPR cases,<sup>96</sup> maintaining a context-sensitive framework would accommodate abstention where a mistake's consequences might be significant.<sup>97</sup>

A bright-line rule is appropriate where the Court can foresee the circumstances in which it will be applied;<sup>98</sup> the prudential political question doctrine, by contrast, operates as a malleable standard to accommodate "unusual cases."<sup>99</sup> The rule-like approach hinted at in *Zivotofsky* would risk closing off that safety valve in an entire category of cases. Future courts can and should take advantage of the opin-

<sup>90</sup> 50 U.S.C. §§ 1541–1548 (2006).

<sup>91</sup> See *id.* § 1543(a).

<sup>92</sup> See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 6 (2010).

<sup>93</sup> See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring) (collecting cases); *Barkow*, *supra* note 57, at 271 n.181. *But see Campbell*, 203 F.3d at 37 (Tatel, J., concurring) (expressing willingness to adjudicate WPR claims).

<sup>94</sup> Cf. RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION 242 (2004) (assuming that the political question doctrine would apply to WPR cases because "troops in the field should not have to await judicial pronouncement on the lawfulness of military orders").

<sup>95</sup> Cf. Fallon, *supra* note 80, at 1291 & nn.68–69 (noting that courts are less likely to locate standards if they question their "capacity to grasp pertinent facts and assess . . . likely consequences"). Even if courts read *Zivotofsky* broadly, they may turn to other justiciability doctrines, such as ripeness, see, e.g., *Doe v. Bush*, 323 F.3d 133, 139–41 (1st Cir. 2003), or invoke limitations on equitable remedies, see Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 620–21 (1976) (discussing *Gilligan v. Morgan*, 413 U.S. 1 (1973)).

<sup>96</sup> Cf. *Zivotofsky*, 132 S. Ct. at 1440 (Breyer, J., dissenting) (suggesting that weighty interests might justify intervention); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (adjudicating a challenge to executive detention while noting that "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty").

<sup>97</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051 (2005) (noting potential costs of wartime judicial error).

<sup>98</sup> See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621–22 (1992).

<sup>99</sup> *Zivotofsky*, 132 S. Ct. at 1433 (Sotomayor, J., concurring in part and concurring in the judgment). Even the *Baker* factors may be insufficiently contextual. See Tushnet, *supra* note 87, at 1204 (noting that a multifaceted test undermines "the characteristic of prudential judgment").

ion's silences in deciding whether strictly enforcing statutory checks on the Executive justifies the negative consequences that may result.

### I. State Sovereign Immunity

*Congress's Enforcement Power Under Section 5 of the Fourteenth Amendment.* — Conceptions of gender discrimination have evolved substantially since the passage of Title VII in 1964,<sup>1</sup> yet courts continue to labor with antiquated and oversimplified notions of discrimination.<sup>2</sup> Last Term, in *Coleman v. Court of Appeals of Maryland*,<sup>3</sup> the Supreme Court held that sovereign immunity prevents damages suits against states under subparagraph (D) of § 2612(a)(1) of the Family and Medical Leave Act of 1993 (FMLA),<sup>4</sup> which provided a right of action against state employers who failed to grant up to twelve weeks of unpaid self-care leave for an employee's illness.<sup>5</sup> Although the Court upheld damages suits for failure to provide family-care leave under subparagraph (C) of the same section in *Nevada Department of Human Resources v. Hibbs*,<sup>6</sup> the Court held that self-care leave did not address gender discrimination and therefore did not qualify as a legitimate abrogation of sovereign immunity under Section 5 of the Fourteenth Amendment.<sup>7</sup> Both the plurality and dissenting opinions reflect a restrictive vision of discrimination that overlooks the evolving complexity of gendered work environments, in which a subtler form of discrimination harms men as well as women.

Daniel Coleman began working for the Maryland Court of Appeals in March 2001.<sup>8</sup> On August 2, 2007, he requested sick leave to care for his own illness, which a doctor had documented.<sup>9</sup> His supervisor responded that if Coleman did not resign, then he would be terminated.<sup>10</sup>

After unsuccessfully seeking administrative remedies, Coleman filed suit in the U.S. District Court for the District of Maryland against the Maryland Court of Appeals as well as his two supervisors for vi-

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<sup>1</sup> See generally Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, LAW & CONTEMP. PROBS., Fall 2009, at 39; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Serafina Raskin, Note, *Sex-Based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping*, 17 HASTINGS WOMEN'S L.J. 247 (2006).

<sup>2</sup> See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 74 (2002).

<sup>3</sup> 132 S. Ct. 1327 (2012).

<sup>4</sup> 29 U.S.C. §§ 2601–2654 (2006 & Supp. V 2011).

<sup>5</sup> See *Coleman*, 132 S. Ct. at 1332 (plurality opinion).

<sup>6</sup> 538 U.S. 721, 724–25 (2003).

<sup>7</sup> See *Coleman*, 132 S. Ct. at 1334, 1338 (plurality opinion).

<sup>8</sup> *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 189 (4th Cir. 2010).

<sup>9</sup> *Id.* Coleman subsequently remained in the care of a doctor for ten days. See *Coleman v. Md. Court of Appeals*, Civil No. L-08-2464, 2009 WL 8400940, at \*1 (D. Md. May 7, 2009).

<sup>10</sup> *Coleman*, 626 F.3d at 189.