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JUDICIAL ANSWER TO POLITICAL QUESTION: THE POLITICAL QUESTION DOCTRINE IN THE UNITED STATES AND ISRAEL

ELAD GIL*

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The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.[1]

When a particular provision empowers a governmental authority, it thereby empowers the court to interpret it . . . submission of the decision on a particular act to a governmental authority does not mean that the issue of the lawfulness of that act was also committed to the government authority.[2]

INTRODUCTION

On September 16, 2003, Menachem Zivotofsky, an American citizen born in Jerusalem in 2002, brought an action by his parents against the U.S. Secretary of State. Zivotofsky sought a declaratory and injunctive relief, requesting to invoke his statutory right under section 214(d) of the Foreign Relations Authorizations Act of 2003, by having the Department of State record "Jerusalem, Israel" as his place of birth instead of just "Jerusalem."[3] Almost ten years later, on July 23, 2013, the D.C. Circuit dismissed his claim on the merits, finding §214(d) unconstitutional.[4]

In the wake of this judgment, the walls of the old city of Jerusalem did not come tumbling down, a Middle Eastern diplomatic turbulence did not emerge, and the executive's policy of neutrality with respect to the city of Jerusalem remained intact. Yet, the litigation around this affair had been up and down the appellate ladder all the way to the Supreme Court, considering the following threshold question: Is Zivotofsky's claim justiciable or nonjusticiable?[5]

Despite several predictions of its upcoming demise, the political question

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[1] Chief Justice John Marshall, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138, 166 (1803).

[2] Justice Aharon Barak, HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 442 [1988] (Isr.), *English version available at* http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf.

[3] Zivotofsky v. Sec'y of State, 2004 U.S. Dist. LEXIS 31172, *1, *4 (D.D.C. Sept. 7, 2004).

[4] Zivotofsky v. Sec'y of State, 725 F.3d 197 (D.C. Cir. 2013).

[5] Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

doctrine has retained its validity in American jurisprudence. Accordingly, it continues to keep certain politically charged issues beyond the reach of the courts as well as to guide and shape policy judgments by the political branches. The ongoing debate regarding the doctrine has yet to be concluded. While in *Zivotofsky v. Clinton* the Supreme Court found the question justiciable, a concurring opinion by Justice Sotomayor and a dissent by Justice Breyer indicate that, even though its scope is uncertain, the doctrine is still alive and applicable in American law.

This article seeks to reassess the political question doctrine through a comparative analysis with, ironically, the state that was at the center of Zivotofsky's claim, a democracy that has taken a rather radical approach to questions of the justiciability of political questions. The Supreme Court of Israel, led by the court president at the time, Judge Aharon Barak, has adopted a judicial policy that holds practically every political matter justiciable.[6] Subsequently, in recent years the Israeli court has decided on the merits cases regarding targeted killings,[7] the capacity of a "lame duck" government to negotiate peace agreements,[8] a decision to engage in prisoner swap deals with terror organizations,[9] and the privatization of state prisons.[10] Evaluating the Israeli judicial policy provides insight in reviewing the American practice. I will also argue that it unveils some of the fundamental flaws and weaknesses in the notion of nonjusticiable political questions.

The article will proceed as follows: Part I presents the definition and the characteristics of the political question doctrine, and discusses the primary arguments supporting and criticizing it. The discussion unfolds two aspects that encompass the debate around the notion of nonjusticiable political questions: the first is the jurisprudential nature of the doctrine and the second is its political nature. Part II provides a brief positive assessment of the doctrine in U.S. jurisprudence in order to evaluate its scope of application in contemporary case law. Part III unfolds the Israeli approach regarding justiciability, and Part IV examines whether its rationales may justify the reevaluation of the guidelines

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[6] HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 442 [1988] (Isr.), *English version available at* http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf.

[7] HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 68(1) PD 507 [2006] (Isr.) [hereinafter "*The Targeted Killings Case*"], *English version available at* http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.

[8] HCJ 5167/00 Weiss v. Prime Minister 55(2) PD 455 [2001] (Isr.) (defining a lame duck government as a government which lost the confidence of the Knesset and awaits new elections).

[9] HCJ 7523/11 Almagor v. Prime Minister (2011) Nevo Legal Database (by subscription) (Isr.).

[10] HCJ 2605/05 Academic Ctr. of Law and Bus. v. Minister of Fin. (2009) Nevo Legal Database (by subscription) (Isr.), *English version available at* http://elyon1.court.gov.il-/verdictssearch/EnglishVerdictsSearch.aspx.

provided by the six-factor test of the Supreme Court in *Baker v. Carr.*[11]

Ultimately, this article contends that facing its ramifications, the political question doctrine should be applied in the rarest cases, subject merely to prudential considerations. The two classic justifications of nonjusticiability—constitutional commitment of an issue to a coordinate political department and lack of judicially manageable standards—are inherently problematic and cannot justify its revocation. Through a comparative analysis of recent issues that have been held nonjusticiable in the U.S under the Israeli doctrine, this article illustrates that Federal courts have constitutional authority to adjudicate any subject matter, and that legal standards of review are always devisable. Finally, the article recommends limiting nonjusticiability to extremely narrow prudential considerations, by applying a four-prong test. As this article suggests, deference to the standing and expertise of the political branches can and should be realized through other judicial means rather than abstention. Such judicial policy would serve the separation of powers maxim as well as the fundamental principle of the rule of law.

I. Political, Jurisprudential, or Both?

A. *Definition*

The political question doctrine asserts that some issues to be brought before the judiciary shall be exempt from judicial review and the scrutiny of the courts due to their political nature and constitutional affiliation to other branches of the government.[12] It is not the political character of the subject matter that makes a case nonjusticiable, but rather because it involves "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[13] Naturally, by compelling the courts to abstain from addressing a case on the merits, the doctrine serves to draw limitations on the judicial branch to intervene in sensitive political matters.[14]

It seems, however, that beyond this very inconclusive definition of the doctrine, there is very little agreement regarding its contemporary validity, scope of application,[15] wisdom, and rationale.[16] For example, while some argue for

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[11] Baker v. Carr, 369 U.S. 186, 217 (1962).

[12] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) (outlining the foundations of the political question doctrine).

[13] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986). *See also Baker*, 369 U.S. at 217; Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012).

[14] Alexander M. Bickel, The Least Dangerous Branch 186 (2d ed. 1962).

[15] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n. 8 (D.C. Cir. 1984) (Bork, J., concurring) ("It is probably better not to invoke the political question doctrine in this case. That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court . . . and among scholars").

the doctrine's demise,[17] others claimed that such declaration is "premature."[18] When one scholar celebrated the doctrine's "secret life" by which it "continues to lash out in all directions,"[19] previous writing doubted whether it ever existed.[20] Indeed, such polarized positions are hardly a surprise when it comes to an issue that deals with some of the core concerns of a democratic government. It confronts notions of separation of powers against theories of checks and balances among branches of government,[21] and fears unlimited executive discretion on the one hand and judicial supremacy on the other.

B. *The Essence of the Debate*

Traditionally, advocates of the political question doctrine provide several justifications in their favor. The first justification adheres to the lack of constitutional authority of the judiciary to resolve disputes whose resolution is textually committed to a coordinate political department.[22] Accordingly, the political question doctrine serves to properly adjust the allocation of governmental powers between the judiciary and the other branches of government, as prescribed by the Constitution.[23] This justification concedes that the Constitution admits certain issues to the full discretion of the executive or the legislative branches, precluding the courts from resolving such issues on the merits.[24] Louis Henkin, a well-known critic of the notion of non-justiciability, summarizes this justification, saying that "[a]s so conceived . . . some constitutional requirements are entrusted exclusively and finally to the political branches of government for 'self-monitoring.'"[25]

Second, defenders of the doctrine stress that some issues cannot be resolved

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[16] *See* Martin H. Redish, *Judicial Review and "The Political Question"*, 79 Nw. U. L. Rev. 1031, 1031–32 (1984).

[17] 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, 263–74 (2002).

[18] The Political Question Doctrine and the Supreme Court of the United States 1–2 (Nada Mourtada-Sabbah and Bruce E. Cain eds., 2007).

[19] Louis Michael Seidman, *The Secret Life of the Political Question Doctrine,* 37 J. Marshall L. Rev. 441, 443 (2004).

[20] *Compare* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L. J. 597 (1976), *with* Redish, *supra* note 16, at 1034–35.

[21] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962).

[22] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring in part and concurring in the judgment).

[23] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 131–32 (5th ed. 2011).

[24] *Baker*, 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department."); *Zivotofsky*, 132 S. Ct. at 1432 ("[I]n such cases, the Constitution itself requires that another branch resolve the question presented.").

[25] Henkin, *supra* note 20, at 599.

through judicial standards. Rather, they should be the concern of the one of the political branches of government, which holds special expertise in the particular area.[26] One commentator noted that "the court must have some rule to follow before it can operate. Where no rule exists the court is powerless to act. From this it follows that the courts cannot enter into questions of statecraft or policy."[27]

A third argument, which to some extent derives from the previous argument but resorts to prudential grounds, asserts that restraint from deciding on certain politically charged issues preserves the judiciary's institutional legitimacy, credibility and prestige.[28] Alexander Bickel, the architect and devoted advocate of the prudential version of the doctrine,[29] argued that by applying the doctrine the court can "pick its fights" in order to maintain political legitimacy.[30] Bickel argues that its lack of legitimacy to decide in such cases stems from the undemocratic character of judicial review, which is inherently electorally irresponsible.[31] The resort to the prudential justification of nonjusticiability is embodied throughout the *Baker v. Carr* six-factor test in factors three to six,[32] and was centered to Justice Breyer's dissent in *Zivotofsky*.[33]

Ultimately, by resorting to the political question doctrine, courts demonstrate

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[26] *Id.* ("Prominent on the surface of any case held to involve a political question is found a . . . lack of judicially discoverable and manageable standards for resolving it."); Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961) ("Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle.").

[27] Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924).

[28] *Id. See also* Goldwater v. Carter, 444 U.S. 996, 1000 (1979); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 115, 176 (1988).

[29] *See* Bickel, *supra* note 26, at 75–81; Redish, *supra* note 16, at 1043–55; Mark Tushent, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 47–49 (Nada Mourtada-Sabbah and Bruce E. Cain eds., 2007).

[30] Redish, *supra* note 16, at 1032.

[31] Bickel, *supra* note 26, at 75 (noting "the court's sense of lack of capacity, compounded of . . . the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from").

[32] Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found . . . 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.").

[33] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1437–41 (2012) (Breyer, J., dissenting).

respect for the separation of powers maxim. The reluctance to adjudicate cases on these grounds acknowledges that in certain cases, providing an effective judicial remedy may result in excessive oversight of legislative or executive conduct.[34] Such intrusion into the prerogative powers of those branches could derogate from the validity of the separation of powers in the long run.[35] John Marshall embraced this justification while he was a member of the U.S. House of Representatives, stressing that "[i]f the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision . . . . The division of power . . . could exist no longer, and other departments would be swallowed up by the judiciary."[36]

The critics on the other side of the fence would of course dismiss any persuasiveness that might stem from these justifications, holding several counter arguments at their disposal. They argue that fear of lack of judicial standards leading to the "swallowing" of other political departments' exclusive power by the judiciary or the lack of prudence by the courts is excessive and may be reconciled through judicial restraint. Such restraint should be exercised in rare cases, but merely as part of adjudicating the case on the merits, subsequent to an interpretation of the Constitution by the branch invested by the power to do so.[37]

First, with respect to the lack-of-constitutional-authority argument, Martin H. Redish argues that the very notion by which the Constitution—an instrument designed to restrain governmental power and majoritarian control—vests sole and unlimited discretion to a political branch is absurd.[38] The core judicial function is to enforce and protect the Constitution rather than to retreat. Letting the political branches apply "self-monitoring" of their supervision of the Constitution is not plausible judicial conduct.[39]

Second, in rejecting the lack-of-judicial-standard justification, the critics of

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[34] *Baker*, 369 U.S. at 217.

[35] *See* CHEMERINSKY, *supra* note 23, at 134.

[36] Representative John Marshall, Speech on the Floor of the House of Representatives (Mar. 7, 1800), *in* 18 U.S. (5 Wheat.) app. note I, at 16–17 (1820), quoted in Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 25 (Nada Mourtada-Sabbah and Bruce E. Cain eds., 2007).

[37] CHEMERINSKY, *supra* note 23, at 135; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1959).

[38] *See* Redish, *supra* note 16, at 1045–46. Such radical criticism of the doctrine was not shared by Wechsler, who agrees that pursuant to the interpretation of a constitutional provision, the court may conclude that indeed the constitution explicitly excluded judicial review. *See also* Henkin, *supra* note 20, at n. 26 (arguing that while Wechsler reads various clauses as textually barring judicial review, "[h]e would agree, I think, that they might be read otherwise").

[39] *See* CHEMERINSKY, *supra* note 23, at 135.

the doctrine assert that developing and finding judicial standards are inherent in the judicial process. Just as the courts developed legal standards, tests, and formulas interpreting "due process" and "equal protection," they ought to find workable standards of review to other provisions of the Constitution.[40] Courts should not retreat from dealing with cases that present them with politically charged issues or difficult questions.[41] In appropriate cases, courts may give deference to the expertise of the political branches on the subject matter, but merely as an integral part of the judicial review. Redish distinguishes this kind of exercise of power from an *ex ante* abstention from adjudicating the case, recognizing it as "appropriate 'substantive' deference—in which the judiciary, while retaining power to render final decisions on the meaning of the constitutional limits, nevertheless takes into account the need for expertise or quick action."[42]

In regard to the prudential justifications, the critics argue that adjudicating hard political cases was never truly shown to mitigate courts' credibility.[43] Moreover, if society deems the judiciary to be the final interpreter of the Constitution, then abstaining from doing so hampers its legitimacy.[44] In other words, the judiciary's function has never been subject to a popularity vote, and was designed by the Framers to be free from political pressures.[45] Therefore, it lacks the privilege to abstain from judgment in certain issues due to their controversial political nature. In most cases, this is where judicial review is needed the most.

The aforementioned arguments utilize the debate regarding the political question doctrine into two fundamentally distinct frameworks or dimensions. The first is of a political nature, whereas the second is of a jurisprudential nature. Chief Justice Marshall addressed both dimensions of the doctrine in *Marbury v. Madison*: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[46] Excluding questions which are "in their nature political" from courts'

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[40] Redish, *supra* note 16, at 1046–47. *See also*, Erwin Chemerinsky, *Who Should Be the Authoritative Interpreter of the Constitution? Why There Should Not Be a Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 181, 190–97 (Nada Mourtada-Sabbah and Bruce E. Cain eds., 2007) (arguing that society needs the judiciary in order to develop orderly and coherent meaning of the constitution).

[41] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring) ("A judge should not retreat under facile labels of abstention or nonjusticiability, such as the 'political question doctrine,' merely because a statute is ambiguous.").

[42] Redish, *supra* note 16, at 1048–49.

[43] CHEMERINSKY, *supra* note 23, at 135.

[44] Redish, *supra* note 16, at 1053.

[45] *See* U.S. CONST. art. III, § 1 (judges have been given life tenure and it has been stipulated that their salary may not be decreased).

[46] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

review adheres to the jurisprudential nature of the doctrine. Recognizing that the Constitution submitted certain questions to the executive admits the political nature of the doctrine.

1. The Jurisprudential Nature of the Political Question Doctrine

The jurisprudential nature of the political question doctrine does not suggest withholding judicial intervention on grounds of fear of judicial intrusion, separation of powers, or prudential rationales. Instead, it concerns whether the law has normative standards with respect to the political-in-nature subject matter. Arguably, if there is no legal standard to regulate political conduct, then the judicial branch–designed to interpret the law and uphold it—should abstain from addressing the question. As Justice Sotomayor noted in *Zivotofsky v. Clinton*, "[w]hen a court is given no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch, resolution of the suit is beyond the judicial role envisioned."[47] Where there is no legal question, there should be no judicial review. For instance, it was suggested that questions like whether to veto a bill, to recognize a foreign government, to sign a peace treaty or to declare war are subject merely to political (or perhaps diplomatic) discretion, and therefore cannot be reviewed based on a legal standard. Advocates of such a jurisprudential conception of the doctrine would cite several cases in which courts dismissed petitions challenging administrative decisions to engage in war in Vietnam,[48] to employ covert actions in Latin America[49] or to support the Pinochet regime in Chile,[50] conceding that these decisions lack judicially discoverable and manageable standards. However, one may doubt whether these examples prove that the law in fact lacks normative standing on such political matters. According to one view, held by Henkin and Redish, such decisions do not imply that the questions they raised are not justiciable, but rather that the petitions failed to show unconstitutional exercise of the executive's powers to engage in war or to decide on matters of foreign policy. Alternatively, the proposition by which the law has no standing on every political matter is dubious. Any exercise of political power in a democracy is subject to a legal authorization (stemming from constitutional statutory law, etc.) and thus subject to legal review. Consequently, dismissing a case arguing that a war is not constitutional should not be the outcome of a lack of judicially discoverable and manageable standards. Rather, it should be the outcome of a fact-finding and legal analysis

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[47] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring in part and concurring in the judgment). *See also* BICKEL, *supra* note 14, at 186–87 (arguing in this context that "some questions are held to be political pursuant to a decision on principle that there ought to be discretion free of principled rules.").

[48] *See* Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967).

[49] *See* Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005).

[50] Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006).

that find that the exercise of the governmental power to engage in war was in compliance with the Constitution. In other words, having a political element does not make an issue beyond the scope of legal review. The judiciary must devise the appropriate legal standards that would enable it to legally review matters of a political nature. This jurisprudential view inherently rejects the notion of unlimited discretion of any branch of government and denies the existence of legal "black holes."[51] The result of finding a governmental exercise of power nonjusticiable on the one hand, and upholding it on the merits on the other hand is allegedly the same: in both instances the executive action is sustained. However, as far as the rule of law is concerned, it is inherently and materially different. Finding an issue nonjusticiable takes it beyond the reach of the law. It conveys a message to future cases that the coordinate political branch may exercise its governmental power without any legal boundaries. Such result is unwarranted because it favors the rule of the person holding the seat rather the rule of law.

2. The Political Nature of the Political Question Doctrine

The political nature of the doctrine concerns whether the courts should abstain from adjudicating certain political issues despite having the capability to do so, in order to refrain from intruding into areas allocated to other branches of the government by the Constitution. This is a classic separation of powers consideration aligned with prudential considerations. Acknowledgement of "textually demonstrable constitutional commitment of the issue to a coordinate political department"[52] clearly stems from concern of judicial intrusion to areas the Constitution handed to another branch of government. In *El-Shifa Pharmaceutical Industries*, the D.C. Circuit dismissed a Federal Tort Claims Act claim regarding an American missile attack destroying a Sudanese pharmaceutical plant. The court held:

> [i]n refusing to declare the El-Shifa attack "mistaken and not justified," we do not mean to imply that the contrary is true. We simply decline to answer a question outside the scope of our authority. *By requiring that we reserve judgment, the political question doctrine protects the Congress and the Executive from judicial "invasion of their sphere,"* . . . and guards against "the reputation of the Judicial Branch [being] 'borrowed by the political Branches to cloak their work in the neutral colors of judicial action'".[53]

In practice, both the political and the jurisprudential natures of the doctrine blend with one another.[54] It might be expected that the Constitution would vest

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[51] *See* HCJ 168/91 Morcos v. The Minister of Defense 45(1) PD 467, 470 [1991] (Isr.).

[52] Baker v. Carr, 369 U.S. 186, 217 (1962).

[53] El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 846 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 997 (2011) (emphasis added).

[54] *See, e.g.*, *Schneider*, 412 F.3d 190 at 194–99.

certain powers in one of the political branches whereby the subject matter is political and lacks judicial standards of consideration. Moreover, when the court in *Baker v. Carr* suggested applying the doctrine when "[j]udicial resolution would require an initial policy determination of a kind clearly for nonjudicial discretion," it clearly expressed concern regarding both the jurisprudential and the political nature of the doctrine.

II. The Political Question Doctrine in U.S. Jurisprudence

A. *The Origins of the Doctrine*

Chief Justice Marshall made the political question doctrine part of the Supreme Court's case law in 1803.[55] Yet, the underpinnings of the notion by which the Constitution vests certain issues to be addressed and answered merely by the political branches began to emerge a few years earlier. In an oft-quoted statement from The Federalist No. 78,[56] Alexander Hamilton acknowledged:

> [i]f it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not collected from any particular provisions in the constitution.

Congressman John Marshall seemed to embrace this view, asserting that the Constitution extended the judicial power only to a certain point while refraining from "confer[ring] on that department any political power whatever."[57] Marshall understood the constitutional text, "[t]he judicial Power shall extend to all Cases, in Law and Equity," as a limiting clause to judicial power insofar as political questions are concerned. This approach guided him three years later in *Marbury v. Madison*, where the Supreme Court held that questions of political nature and matters that the Constitution and laws submitted to the executive would not be addressed by the court.[58] Furthermore, the court provided principal guidelines for courts to apply in deciding whether a case presents a nonjusticiable political question, noting that "[i]n such cases . . . [t]he subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."[59] Shaping this general formula into a coherent judicial rule and concretizing the areas which would remain nonjusticiable was a challenge left for future courts. Until 1962, when the Supreme Court decided *Baker v. Carr*, the doctrine was applied by

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[55] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803).

[56] Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 424 (1996).

[57] *Supra* note 36, at 17.

[58] *Marbury*, 5 U.S. at 170.

[59] *Id.* at 166.

courts in certain areas, at times rationalized on lack of constitutional authority grounds and in others through a prudential inquiry. Its boundaries were yet to be shaped in a coherent manner.

B. *Establishment in U.S. Jurisprudence*

A judgment finding an issue with a "political question" has far reaching implications on the matter in question. Wherever the doctrine sets foot, judicial scrutiny of the administration's conduct is avoided. The establishment of the doctrine was gradual, as its application slowly expanded to more and more issues.

In *Luther v. Borden*,[60] the court held that issues regarding the guarantee for a republican form of government in the Constitution are political questions to be interpreted and decided exclusively by Congress.[61] The question brought before the Court regarded the ramifications of the Dorr Rebellion in Rhode Island. The petitioner challenged the legal authority of the government to search his premises due to its alleged violation of the Guarantee Clause.[62] Issuing a decision on the merits would have required the Court to decide which government is the legitimate sovereign of Rhode Island. The Court, reluctant to do so, held that the Constitution rested with the political power to decide whether the charter government has been lawfully established. Chief Justice Roger B. Taney opted for restraint, acknowledging the Court's "duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums."[63] The Court reaffirmed the Guarantee Clause as a nonjusticiable issue in *Pacific States Telephone and Telegraph Co. v. Oregon*,[64] and has been consistent with this holding.[65] That, according to some scholars, may change sooner rather than later.[66]

The Court also ruled certain aspects of war powers as nonjusticiable. In *Martin v. Mott*,[67] the Court concluded that the president has the exclusive prerogative to call the militia into service. Later, in *Commercial Trust Co. of New Jersey v. Miller*,[68] the Court held that the political branches, not the judiciary,

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[60] Luther v. Borden, 48 U.S. 1 (1849).

[61] *Id.* at 42–47.

[62] U.S. CONST. art. IV, § 4.

[63] *Luther*, 48 U.S. at 46.

[64] Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (dismissing a challenge to an Oregon tax law that was based on its violation of the Guarantee Clause).

[65] *See, e.g.*, Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916).

[66] *See, e.g.*, Richard L. Hasen, *Leaving the Empty Vessel of "Republican" Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 79–81 (Nada Mourtada-Sabbah and Bruce E. Cain eds., 2007).

[67] Martin v. Mott, 25 U.S. 19, 28 (1827)

[68] Commercial Trust Co. of New Jersey v. Miller, 262 U.S. 51 (1923).

determine when a war begins and ends.[69] In the years to come, lower courts would find the constitutionality of wars and other covert action to pose a nonjusticiable political question.[70]

Another nonjusticiable political question was the ratification process of constitutional amendments. In *Coleman v. Miller*,[71] the Court held that the Constitution grants Congress the exclusive power to control submission of constitutional amendments. The amendment in question was the Child Labor Amendment, which mandated the Congress to have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.[72] Article V of the Constitution provides that a proposed constitutional amendment must be "ratified by the Legislatures of three fourths of the several States" in order to become valid.[73] In 1924, the Kansas State Senate rejected the proposed Amendment. Thirteen years later, in 1937, a resolution ratifying the proposed Amendment was reintroduced before the Senate. After the initial vote concluded in a tie, the Lieutenant Governor, in his capacity as presiding officer of the senate, cast his vote in favor of the resolution as the deciding vote. The petitioners challenged the constitutionality of the ratification process, mainly because of the time that elapsed between the initial ratification in the Congress and the conclusion of the ratification process in the states. The majority opinion held that the ultimate authority to review the constitutional amendment process was vested with the Congress. Therefore, it constitutes nonjusticiable political question.[74] Justice Black's concurring opinion was even more radical about the notion of judicial review of the process, determining that "[s]ince Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress . . . ."[75]

In 1946 the Court also found the congressional districting power to be a nonjusticiable political question. In *Colegrove v. Green*,[76] the petitioners challenged the validity of the districting process in Illinois, arguing that the reduction of effectiveness of their vote was the outcome of an unconstitutional legislative discrimination. As Rachel Barkow notes,[77] the holding in *Colegrove* indicates almost sole reliance on prudential considerations rather than mere ab-

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[69] *Id.* at 57 ("[t]he power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time.").

[70] *See, e.g.*, Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006); Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005); Doe v. Bush, 322 F.3d 109 (1st Cir. 2003); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir. 1967).

[71] Coleman v. Miller, 307 U.S. 433 (1939).

[72] *Id.* at 436.

[73] U.S. CONST. art. V.

[74] *Coleman*, 307 U.S. at 450.

[75] *Id.* at 459.

[76] Colegrove v. Green, 328 U.S. 549 (1946).

[77] Barkow, *supra* note 17, at 32.

sence of constitutional grant of judicial power.[78] The Court declined to "enter this political thicket."[79] Justice Frankfurter questioned the Court's capability to alter the Illinois districting with standards of fairness,[80] and ultimately warned of the ramifications of holding the current system invalid, asserting it would "bring courts into immediate and active relations with party contests."[81] And finally, Justice Frankfurter concluded, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."[82]

The political question doctrine further expanded to foreign relations issues. In 1818, the Court initially noted that foreign policy issues are "generally rather political than legal in their character."[83] A century later, the Court shaped the rule, concluding that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[84]

In conclusion, while the Supreme Court did not consistently apply the doctrine or shape coherent tests to determine which questions are political, the political question doctrine expanded slowly into numerous governmental areas.[85] The Court's opinion in *Baker v. Carr* presumed to change this course by providing a set of criteria characterizing the political question doctrine as a narrow exception to courts' duty to adjudicate cases.

C. *Baker v. Carr and its Aftermath*

Baker v. Carr was a districting action filed by Tennessee voters, challenging the constitutionality of a state apportionment statute from 1901, which allegedly arbitrarily and randomly apportioned the state's representatives. Fifteen years earlier in *Colegrove*, a different Court held the districting issue to be a nonjusticiable political question. The Court, led by the new Chief Justice Earl Warren, embraced the chance to issue an overreaching opinion with respect to

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[78] Although the Court did cite to Article I Section 4, noting that "the constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people." *Colegrove*, 328 U.S. at 554.

[79] *Id.* at 556.

[80] This view of the Court's incompetence implies that the Court adhered mainly to the jurisprudential nature of the political question in this case. It also noted in this context that "effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." *Id.* at 552.

[81] *Id.* at 553

[82] *Id.* at 553–54.

[83] United States v. Palmer, 16 U.S. 610, 634 (1818).

[84] Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

[85] See CHEMERINSKY, *supra* note 23, at 132; Barkow, *supra* note 36, at 28.

the political question doctrine, defining its limits and highlighting its attributes. After initially excluding matters stemming from interrelations between the judiciary and the states from the scope of the doctrine, the Court crystallized the relevant case law into six identifying factors of political nonjusticiable questions:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[86]

Each of these factors alone may imply that the question before the court is political.[87] Judicial finding that an issue constitutes nonjusticiable political question will be determined on case-by-case evaluation.[88] Even with respect to foreign affairs, an area traditionally regarded as lying at the core of the doctrine,[89] the Court noted "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[90] In analyzing the essence of the doctrine, the Court noted that the doctrine is primarily a function of separation of powers, hence adhering to the political nature of the doctrine as noted above.[91] However, it also acknowledged its jurisprudential nature by asserting that "lack of judicially discoverable and manageable standards"[92] is a relevant factor to find a case nonjusticiable.[93]

In the wake of *Baker*, the Court deemed the doctrine inapplicable in a variety of cases and broadened its own scope of review over governmental conduct. Prescribing six guiding factors turned out to be far more restrictive on the doc-

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[86] Baker v. Carr, 369 U.S. 186, 217 (1962).

[87] *See Schneider*, 412 F.3d at 194; Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 44–45 (D.D.C. 2010).

[88] *Baker*, 369 U.S. at 211.

[89] *See* Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) (Breyer, J., dissenting); Barkow, *supra* note 36, at 38.

[90] *Baker*, 369 U.S. at 211.

[91] *Id.* at 210.

[92] *Id.* at 217.

[93] Arguably, the third factor also adheres to the jurisprudential nature of the doctrine. *Id.*

trine's applicability than providing firm grounds to use it. Cases regarding a variety of issues with political sense were held justiciable, and not raising a political question. This included cases dealing with politically motivated discharge of employees,[94] recognition of American de facto sovereignty over a territory,[95] a constitutional challenge to single house vetoes under the Naturalization Clause,[96] and review of whether the Secretary of Commerce was required to issue certification regarding Japan's whaling practices pursuant to the relevant treaty.[97] The declining invocation of the doctrine to resolve politically charged cases has led several commentators to argue that the doctrine has become a dead letter,[98] or to doubt whether it ever existed.[99] Pursuant to the 2000 elections cases,[100] others have also argued of its demise.[101] One commentator noted with respect to *Bush v. Gore* that "[t]he Supreme Court's failure even to consider the political question doctrine reflects a broader trend in which the Court overestimates its own powers and prowess vis-a-vis the political branches. The political question doctrine itself cannot coexist with the current Court's views of how interpretive power is allocated under the Constitution."[102]

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[94] Elrod v. Burns, 427 U.S. 347, 351–52 (1976) ("That matters related to a State's, or even the Federal Government's, elective process are implicated by this Court's resolution of a question is not sufficient to justify our withholding decision of the question. In particular, in this case, ware [sic] asked only to determine whether the politically motivated discharge of employees of the Cook County Sheriff's Office comports with the limitations of the First and Fourteenth Amendments. This involves solely a question of constitutional interpretation, a function ultimately the responsibility of this Court.").

[95] Boumediene v. Bush, 553 U.S. 723, 754 (2008).

[96] Immigration & Nationalization Serv. v. Chadha, 462 U.S. 919, 940–42 (1983).

[97] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch . . . . [H]owever, the courts have the authority to construe treaties and executive agreements . . . . [T]he challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of [International Whaling Commission] quotas presents a purely legal question of statutory interpretation.").

[98] *See* Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406 (1984). *See also* Barkow, *supra* note 17, at 272 n. 182.

[99] Henkin, *supra* note 20.

[100] Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000); Bush v. Gore, 531 U.S. 98 (2000).

[101] Barkow, *supra* note 17, at 272. For arguments supporting the applicability of the doctrine in the Bush cases, *see* Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 336–45 (2001) (arguing the subject matter met the two first criteria in *Baker*). *See generally* RICHARD L. PACELLE, THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS: THE LEAST DANGEROUS BRANCH? 168–69 (2002).

[102] Barkow, *supra* note 17, at 300.

D. *Contemporary Application*

It seems, however, that the declarations of the doctrine's demise were premature. Although contemporary case law demonstrates a general reluctance to find cases nonjusticiable, the Supreme Court, as well as lower federal courts, continues to consider its applicability and has invoked the doctrine from time to time. Since *Baker*, the Supreme Court has explicitly invoked the doctrine on two occasions. In *Gilligan v. Morgan*,[103] the complaint regarded alleged violations of students' rights by the Ohio National Guard during protests against the Vietnam War. The issue before the court was whether the pattern of training, weaponry, and orders in the Ohio National Guard, which required the use of lethal force upon the protesters, were reasonably necessary. The Court found the issue to be a nonjusticiable political question. Facing *Baker* and further case law implying the doctrine's decline, the Court noted: "because this doctrine has been held inapplicable to certain carefully delineated situations [i]t is no reason for federal courts to assume its demise."[104] In holding the case nonjusticiable, the Court relied on lack of constitutional authority and lack of judicial standard justifications (*Baker*'s first and second factor) altogether:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions regarding the composition, training, equipping, and control of a military force are essentially professional military judgments, always subject to civilian control of the Legislative and Executive Branches.[105]

Nixon v. United States concerned a constitutional challenge to an impeachment process of a federal judge.[106] The Court primarily relied on *Baker*'s first factor in holding that the Senate's sole power to conduct impeachments deemed the issue nonjusticiable.[107] Moreover, the Court, citing to *Baker*'s second factor, found that it could not develop a manageable judicial standard to review the trial conducted by the Senate.[108]

Yet the gerrymandering issue seems to illustrate how strong the roots of the doctrine in U.S. jurisprudence are. In *Veith v. Jubelirer*[109] and *League of Unit-*

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[103] Gilligan v. Morgan, 413 U.S. 1 (1973).

[104] *Id.* at 11.

[105] *Id.*, at 10 (emphasis added).

[106] Nixon v. United States, 506 U.S. 224 (1993).

[107] *Id.* at 229 ("The first sentence is a grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else.").

[108] *Id.* at 230.

[109] Veith v. Jubelirer, 541 U.S. 267 (2004).

ed Latin American Citizens v. Perry,[110] the issue was whether partisan gerrymandering violates the Equal Protection Clause. Both cases were dismissed in plurality opinions. In *Veith*, four Justices held the issue nonjusticiable based on the lack of judicially discoverable or manageable standards for judicial review. Years after the Court's holding in *Davis v. Bandemer*, which found partisan gerrymandering justiciable despite lack of agreement regarding the appropriate standard of review,[111] Justice Scalia wrote the plurality opinion in *Veith*, concluding that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."[112] Justice Kennedy concurred, finding the concrete case nonjusticiable, but hesitated to declare justiciability for all future redistricting cases.[113] In *League of United Latin American Citizens*, another attempt to address the issue turned out to be fruitless. While the Court found part of the 2003 Texas redistricting plan redrawing the formerly majority-Latino district's lines to be in violation of Section 2 of the Voting Rights Act,[114] the Court dismissed the constitutional claim of statewide partisan gerrymandering on the grounds of lack of a workable judicial test. Although Justices Scalia and Thomas were the only voices expressly holding the question nonjusticiable, the disarray and absence of providing coherent judicial policy regarding the justiciability of the issue has delivered a message that the judiciary would prefer to avoid adjudicating such cases. As noted elsewhere, "[i]f anything, *LULAC's* limited majority opinion and six separate concurrences plunged partisan gerrymander jurisprudence deeper into confusion."[115]

The outcome of both cases cannot go in line with an alleged trend arguing that the notion of nonjusticiable political question is in decline. Moreover, their holdings illustrate the invocation of the doctrine in an area that, unlike *Nixon* and *Gilligan*, does not lie at the core of governmental functions that the Constitution had vested in coordinate political departments. To find, *de facto*, an alleged practice of manipulating geographic boundaries of electoral districting, a "political question" is, arguably, a very radical application of nonjusticiability. To suggest that the integrity of the election process, perhaps the most fundamental act in a democracy, is not accountable to any legal standard proves that the doctrine is very much alive.

Zivotofsky v. Clinton[116] is the most recent political question case decided by the Supreme Court. While the court found the case justiciable, a closer look at

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[110] League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

[111] Davis v. Bandemer, 478 U.S. 109 (1986).

[112] *Veith*, 541 U.S. at 281.

[113] *See id.* at 306–17 (Kennedy, J., concurring).

[114] 42 U.S.C. §§ 1973–1973aa-6 (1965).

[115] Aaron Brooks, *Court's Missed Opportunity to Draw the Line on Partisan Gerrymandering:* LULAC v. Perry, 30 HARV. J.L. & PUB. POL'Y 781, 782 (2007).

[116] Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

the decision reveals it as another example of the doctrine's strong roots and validity in contemporary jurisprudence.

Menachem Zivotofsky was born in Jerusalem in 2002.[117] Shortly after his birth, his mother, seeking to invoke his statutory right under Section 214 of the Foreign Relations Authorization Act,[118] filed an application to the U.S. Embassy requesting his U.S. passport to list "Jerusalem, Israel" as his place of birth. The embassy officials refused and listed his place of birth as simply "Jerusalem," expressing the State Department's longtime policy of neutrality towards the status of Jerusalem. Zivotofsky brought a claim against the Secretary of State in Federal District Court, asking to enforce his statutory right. The court dismissed the claim, holding that Zivotofsky lacked standing and finding that the case presents a nonjusticiable political question.[119] The D.C. Circuit reversed on standing and remanded.[120] The District Court dismissed again, this time on the ground of a nonjusticiable political question,[121] and Zivotofsky appealed. The D.C. Circuit affirmed the judgment.[122] The court reasoned that the Constitution gives the executive the sole power to recognize foreign sovereigns. Accordingly, resolving the case would necessarily compel the court to take a position on the status of Jerusalem, which the court prefers to refrain from doing. It was a demonstration of a classic lack of constitutional authority argument: the court cited *Baker's* finding that "courts may not consider claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution."[123]

The Supreme Court vacated and remanded. Chief Justice Roberts, writing the opinion of the Court, concluded that Zivotofsky's case did not meet any of the narrow exceptions decided in *Baker*. The lower courts misinterpreted the issue arising in Zivotosky's case, as they were not asked to replace the State Department's policy considerations with their own determination regarding the status of Jerusalem, but rather to enforce a specific statutory right. The Court concluded: "[t]o resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise."[124] Next, the Court found the lack-of-judicial-standard argument invalid as well. Chief Justice Roberts recited the parties' competing claims concerning the issue at hand, and determined that resolving them

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[117] *Id.* at 1425–26.

[118] The Foreign Relations Authorization Act, Fiscal Year 2003, H.R. 6018, 112th Cong. §214(d), Pub. L. No. 107-228, 116 Stat. 1350 (2002) ("For purposes of the registration of birth . . . of a United States citizen born in the city of Jerusalem, the Secretary shall . . . record the place of birth as Israel.").

[119] Zivotofsky v. Sec'y of State, 2004 U.S. Dist. LEXIS 31172 (D.D.C. Sept. 7, 2004).

[120] Zivotofsky v. Sec'y of State, 444 F.3d 614 (D.C. Cir. 2006).

[121] Zivotofsky v. Sec'y of State, 511 F. Supp. 2d 97 (D.D.C. 2007)

[122] Zivotofsky v. Sec'y of State, 571 F.3d 1227 (D.C. Cir. 2009).

[123] *Id.* at 1230.

[124] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012).

would demand "careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. *This is what courts do*."[125]

Justice Sotomayor issued a concurring opinion aiming to provide a more demanding inquiry of the circumstances appropriate for invoking the political question doctrine in the wake of *Baker*.[126] The *Baker* six-factor test, she asserted, centers around three distinct justifications for a court to abstain from adjudicating a case: first, disputes in which "the court lacks [constitutional] authority to resolve [the] issue";[127] second, "circumstances in which a dispute calls for decision making beyond courts' competence";[128] and third, rare "circumstances in which prudence may counsel against a court's resolution of an issue presented."[129] While all three justifications are part of *Baker*'s six-factor test, prudential considerations would render a case nonjusticiable only in rare and exceptional cases.[130] Perhaps as a way of preventing a broad reading of the Court's opinion, Justice Sotomayor argued that it is possible that a case involving the application of a statute or its constitutionality would present a nonjusticiable political question.[131] This determination was reasoned, inter alia, by adhering to the Court's decisions in *Ohio ex rel. Davis v. Hildebrant*[132] and *Nixon*. In Justice Sotomayor's view, the fact that a case can be resolved by a "careful examination of the textual, structural, and historical evidence" brought by the parties does not necessarily imply judicially discoverable and manageable standards.

Justice Alito concurred in the judgment. While holding that "determining the constitutionality of an Act of Congress may present a political question,"[133] Justice Alito found that the issue before the court was whether § 214(d) infringes on the power of the President to regulate the contents of a passport. This narrow question, he asserted, does not constitute a nonjusticiable political question.

Justice Breyer dissented, deeming the case nonjusticiable on prudential grounds.[134] He concurred with Justice Sotomayor's determination that abstention from adjudication due to prudence is appropriate only in rare cases, but recognized Zivotofsky's case as such.[135] Justice Breyer reached his decision by recognizing four sets of prudential considerations, taken together: first, that the

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[125] *Id.* at 1430 (emphasis added).
[126] *Id.* at 1431–37 (Sotomayor, J., concurring).
[127] *Id.* at 1431–32.
[128] *Id.* at 1432.
[129] *Id.*
[130] *Id.* at 1434.
[131] *Id.* at 1435.
[132] 241 U.S. 565 (1916).
[133] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1436 (2012) (Alito, J., concurring).
[134] *Id.* at 1437–41 (Breyer, J., dissenting).
[135] *Id.* at 1437.

case lies in the realm of foreign affairs, which implicates the "judicial hesitancy to make decisions that have significant foreign policy implications."[136] Second, he noted the case requires the court "to evaluate the foreign policy implications of foreign policy decisions."[137] The parties' briefs point out counter arguments concerning the foreign policy effect of the decision, and "[a] judge's ability to evaluate opposing claims of this kind is minimal."[138] Third, the petition did not involve a kind of interest "which courts have traditionally sought to protect" or which vindicate a basic right.[139] Fourth, when the political branches have non-judicial methods of working out their differences, the need for judicial intervention is minimized.[140] Justice Breyer concludes that Zivotofsky's claim is an unusual case illustrating several prudential considerations, which altogether justify abstention form judicial intervention.[141]

The contemporary Supreme Court case law demonstrates general hesitation and reluctance in finding cases nonjusticiable on grounds of political question. Nonetheless, the doctrine's well-established roots in American jurisprudence have been, and by all signs shall continue, to keep several politically charged issues beyond the scrutiny of the courts. More than in other fields of government conduct, foreign affairs and national security issues have been kept away from judicial review.[142] Federal courts again and again have held such issues nonjusticiable political questions,[143] finding that "[m]atters intimately related to foreign policy and national security *are rarely proper subjects for judicial intervention*."[144]

We now turn to examine the justiciability doctrine applicable in Israel, where the Israeli Supreme Court adopted a fairly different approach regarding the nature of judicial power in reviewing political questions.

III. The Political Question Doctrine/Justiciability in Israel

A. *Introduction*

The Israeli legal system is based for the most part on the common law tradition, a heritage from the British Mandate, which governed the land until 1948. At the same time, the substantive and procedural laws reflect a diverse history influenced by Jewish, Ottoman, Civil, and in recent years, American law. The

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136 *Id.* at 1437–38.

137 *Id.* at 1438.

138 *Id.* at 1440.

139 *Id.*

140 *Id.* at 1441.

141 *Id.*

142 *See, e.g.*, Haig v. Agee, 453 U.S. 280, 292 (1981); Pauling v. McNamara, 331 F.2d 796, 799 (D.C. Cir. 1963).

143 *See, e.g.*, *Haig*, 453 U.S. at 292; *Pauling*, 331 F.2d at 799; *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 846.

144 Bancoult v. McNamara, 445 F.3d 427, 433 (D.C. Cir. 2006) (emphasis added).

fundamental constitutional principles of Israel were addressed in the Declaration of Independence.[145] Yet these principles had never progressed to a formal constitution. A continuing state of emergency and national security challenges, along with massive immigration that created a multicultural society and tensions between religious and ethnic minorities, prevented the founders from reaching an agreement regarding a written constitution.[146] As an alternative, the first Knesset[147] decided to formulate the constitution gradually, chapter by chapter.[148] Each chapter was regarded as a Basic Law, and considered higher than an act of the Knesset in the normative constitutional hierarchy.[149] The Israeli Supreme Court, in addition to its role as court of last resort, acts simultaneously as the High Court of Justice ("HCJ"). In that capacity, the court holds constitutional and administrative review over the Knesset and the Government.[150] The Supreme Court's power to exercise judicial review as High Court of Justice is discretionary rather than mandatory, as Article 15(c) of Basic Law the Judiciary provides: "[t]he Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice."[151] The question of justiciability of political matters has occupied the court from the outset.

B. *The Initial Approach: Barriers of Nonjusticiability*

Traditionally, the Israeli Supreme Court in its early years viewed political questions, namely matters in the sphere of the relationship between the executive and the Knesset, as nonjusticiable. In *Jabotinsky v. Weizmann*,[152] the petitioner argued that the President failed to meet his legal obligations pursuant to the first government resignation and appealed to the court to issue an injunction

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[145] DECLARATION OF ESTABLISHMENT OF STATE OF ISRAEL (1948) ("The state of Israel . . . will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations"), *English version available at* http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx.

[146] YAACOV S. ZEMACH, THE JUDICIARY OF ISRAEL 23–24 (2d. ed. 1998). *See also*, SUZIE NAVOT, CONSTITUTIONAL LAW OF ISRAEL (2007).

[147] The Knesset is the national Legislative branch of the State of Israel.

[148] *See* 5 Knesset Proceedings, at 1743 (1950) (Isr.).

[149] *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Village 49(4) PD 221 [1995] (Isr.), *English version available at* http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.

[150] The court's power to exercise constitutional review was acknowledged in the landmark case *Bank Hamizrachi* in 1995. *See Id.*

[151] Basic Law: The Judiciary, Art. 15 (Isr.).

[152] HCJ 65/51 Jabotinsky v. Weizmann 5 PD 801 [1951] (Isr.).

compelling the President to explore all legal options before ordering new elections. Relying to a large extent on American precedents, the court's President Moshe Zmora dismissed the claim holding the issue exclusively as part of the executive and political powers of the President.[153] The court found the matter unsuitable for judicial determination, and ineligible to be decided by the "expert feel of lawyers."[154] The same judicial approach was exercised in a case challenging the legality of the decision to engage in diplomatic relations with Germany[155] and a petition requesting the court to order the Minister of Defense to examine and investigate certain events of the Yom Kippur War.[156]

C. *The Ressler Revolution: Is Every Question Justiciable?*

In 1986, a group of army reserve soldiers filed a petition challenging the legality of the government's long-time practice of granting Yeshiva students[157] deferral of their military service for as long as they continue their full-time studies.[158] The Israeli law requires mandatory military service for all non-Arab citizens of the State.[159] This practice has been the source of political tension in Israel for decades.[160] The Israeli Supreme Court, in prior cases, found the issue to be nonjusticiable,[161] but in 1988 the petitioners faced a different, more proactive Supreme Court, determined to face the issue on its merits.[162] While the petition was eventually dismissed on the merits,[163] Justice Barak's landmark opinion shifted the course of the Israeli law approach to justiciability, and not merely with respect to political matters.[164] In subsequent academic writing,

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[153] *Id.* at 813–15.

[154] *Id.* at 814.

[155] HCJ 186/65 Riner v. The Prime Minister 19(2) PD 485 [1965] (Isr.).

[156] HCJ 561/75 Ashkenazi v. Minister of Defense 30(3) PD 309, 319–20 [1976] (Isr.).

[157] Yeshiva students are Orthodox Jews who devote their time exclusively to studying Torah and Jewish Law in religious institutions. *See* CHAIM GRADE, THE YESHIVA (1977).

[158] HCJ 910/86 Ressler v. Minister of Defence 42(2) PD 442 [1988] (Isr.).

[159] The Defense Service Law [Consolidated Version] 1986 (Isr.), *available at* http://www.mfa.gov.il/mfa/mfa-archive/1980-1989/pages/defence%20service%20law%20-consolidated%20version—%205746-1.aspx.

[160] In 2012, twenty-four years after its decision in *Ressler*, the Supreme Court held the law regulating the practice since 2002 unconstitutional. See HCJ 6298/07 Ressler v. The Knesset (Feb. 22, 2012), Nevo Legal Database (by subscription) (Isr.), *English version available at* http://elyon1.court.gov.il/verdictssearch/EnglishVerdictsSearch.aspx.

[161] HCJ 40/70 Becker v. Minister of Defence 24(1) P.D. 238 [1970] (Isr.); HCJ 448/81 Ressler v. Minister of Defence (Ariel Sharon) 36(1) P.D. 81 [1981] (Isr.).

[162] *See* Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17(3) TEL-AVIV U. L. REV. 50 (1993).

[163] *Ressler* 42(2) PD 442 at ¶ 71.

[164] Simultaneously and with no less importance, Justice Barak's opinion presented judicial policy that lowered the threshold with respect to standing. Contemporary Israeli law does not require the petitioner to show direct personal interest to his cause of action. The HCJ would grant standing whenever the petitioner can raise substantive constitutional or

Barak continued to develop his approach to justiciability,[165] an approach the Supreme Court follows today.[166] The description of his justiciability doctrine in this part is based primarily on Justice Barak's holding in *Ressler* and to some degree on clarifications given in his subsequent writing.

Ressler's fundamental approach concerning justiciability is the observation and distinction between "Normative Justiciability" and "Institutional Justiciability":

> Normative justiciability answers the question of whether legal standards exist for the determination of the dispute before the court. Institutional justiciability answers the question of whether the court is the appropriate institution to decide a dispute, or whether perhaps it is appropriate that the dispute be decided by a different institution, such as the legislative or executive branches. These two meanings of justiciability are distinct, so that they ought not, therefore, to be confused.[167]

The term normative justiciability represents therefore what was regarded in Part I of this article as the jurisprudential nature of the political question doctrine, while the term institutional justiciability addresses the political nature of the doctrine.

1. Normative Justiciability

A dispute would be justiciable in the normative meaning of the term if legal standards may be used in order to resolve it.[168] When judicial ruling is feasible,

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administrative question with implications on the rule of law. *See Ressler* 42(2) PD 442 at ¶ 24–25 (Barrack, J.); ZEMACH, *supra* note 146, at 98–99.

[165] *See, e.g.*, AHARON BARAK, THE JUDGE IN A DEMOCRACY 178–89 (2006); Aharon Barak, *The Essence of Judicial Activism*, 17 TEL AVIV L. REV. 475 (1993); ARIEL L. BENDOR & ZEEV SEGAL, THE HAT MAKER: DISCUSSIONS WITH JUSTICE AHARON BARAK 119–38 (2009).

[166] Justice Aharon Barak was nominated to the Supreme Court in 1978 and sat on the bench until 2006, serving as the court's president from 1994. He is considered by most commentators to be the most influential judge that ever sat on the bench in Israel. For a comprehensive discussion of Barak's influence on Israeli law see THE JUDICIAL LEGACY OF AHARON BARAK (Celia Fassberg et al. eds., 2009).

Furthermore, Barak is a highly respected jurist worldwide. He served as a guest professor at Yale Law School and the faculty of law at the University of Toronto. In addition he received awards and honors from distinguished universities, such as Yale, Michigan, Columbia, Toronto, and Oxford, and was awarded the prestigious "Justice Prize" from the Peter and Patricia Gruber Foundation. *See* Hillel Somer, *Richard Posner on Aharon Barak*, 49 HAPRAKLIT L. REV 523 (2008). Judge Richard Posner, one of Barak's formidable critics, also stressed that "[i]f there were a Nobel Prize for law, Barak would probably be an early recipient." Richard Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007), http://www.newrepublic.com/article/enlightened-despot.

[167] *Ressler* 42(2) PD 442 at ¶ 34.

[168] *Id.* at ¶ 35

a dispute is justiciable in a normative sense.[169] This view of political question cases is hardly innovative, but rather practically equivalent to the second factor noted in *Baker* ("lack of judicially discoverable and manageable standards for resolving [the dispute].").[170] The theoretical dissimilarity between *Baker* and *Ressler* derives from the subsequent conclusion of Justice Barak's holding. Barak argued that there can be no situation in which there is no legal norm applicable to regulate human action.[171] The point of departure of this argument is that the law is a system of prohibitions and consents. It encompasses every human activity in a society and takes a stand whether the activity is permitted or forbidden. There is no act to which the law does not apply.[172] Consequently, the fact that a question has a political sense and political implications cannot eliminate the judiciary's capability to resolve it and to say what the law is.[173] The political nature of the act does not exclude the legal nature of it and vice versa. The function that the judiciary fulfills is to resolve the legal question: whether the law permits the act or forbids it. For example, the decision to engage in war obviously carries political implications, but that is not to say that legal criteria cannot be applicable to resolve the legality of the question. The legal assessment does not inquire as to whether the decision was wise or desired, but rather whether it was legal. Nonetheless, the application and interpretation of the legal standard may be shaped by the political nature of the conduct and the organ vested with the power to employ it. It means that, subject to different considerations, the legal standard may give broad discretion to the political branch. It may result in a dismissal of the case for a failure to state a cause of action. However this view does not admit that an issue is not justiciable. It denounces a legal vacuum.[174]

Justice Barak concedes that legal standards are prerequisite in order to apply judicial review. He admits that "it is quite impossible to refer to the existence

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[169] *Id.*

[170] Baker v. Carr, 369 U.S. 186, 217 (1962).

[171] *Ressler* 42(2) PD 442 at ¶ 36 ("Indeed, every action can be 'contained' within a legal norm, and there is no action regarding which there is no legal norm which 'contains' it. There is no 'legal vacuum,' in which actions are undertaken without the law taking any position on them. The law spans all actions. Sometimes it prohibits, sometimes it permits.") *See also* Barak, *The Essence of Judicial Activism*, *supra* note 165, at 485–86.

[172] Barak, *supra* note 165, at 485–86.

[173] BARAK, *supra* note 165, at 179.

[174] *Ressler* 42(2) PD 442 at ¶ 36–37 ("[T]he political matter is likely to affect the content of the legal aspect. Moreover, the political aspect is likely at times to bring about a situation in which a particular rule of public law will not apply to specific actions having political consequences. In all of these situations, we are not contracted with a situation where no legal norms exist. On the contrary: in every one of these cases we are concerned with a situation in which a legal norm exists whose content does not prohibit, but rather permits, political action. The petition will not be dismissed in these cases because of a preliminary claim of normative non-justiciability, but rather on its merits, for lack of a cause of a dam.").

of a legal norm, and at the same time, to the absence of legal standards. If the norm exists, it follows that legal standards also exist. If no legal standards exist, that means that the particular legal norm does not exist."[175] Barak's conclusion is that legal standards are always feasible. When no express legal provision to provide the standard of review is applicable, the judge should devise it by applying valid general legal principles.[176] That legal principle would produce the legal criteria needed for judicial review of the act. For example, when reviewing the legality of governmental conduct by the executive branch, Justice Barak incorporated the test of reasonableness as a primary standard of review.[177] The standard of reasonableness contends that the government and its agencies have legal and constitutional authority to exercise their functions in a reasonable manner.[178] A governmental act would be reasonable insofar as the executive decides to perform it upon considering only relevant factors and pursuing relevant interests, while giving an appropriate weight to each factor in order to reach the decision.[179]

Consider the following example: the government decides to enter a prisoner-swap deal in which it agrees to pardon convicted terrorists.[180] While the executive holds the constitutional power to enter such a deal, it may do so only in a reasonable manner. If the court determines that the decision was motivated by irrelevant considerations (e.g., for personal gain), the court may void the action on the grounds of reasonableness.[181] Indeed, the executive power is never unlimited and must be performed within the scope of the law. Considerations that derive from personal gain are not within the scope of reasonableness and therefore unlawful. The legal standard does not review the wisdom of a prisoner-swap deal. The court's deference to the executive is expressed by providing it a broad margin of reasonableness. However, its conduct while pursuing governmental functions is not a nonjusticiable political question.

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[175] *Id.*

[176] *Id.* at ¶ 36.

[177] *See, e.g.*, HCJ 389/80 Dapei Zahav v. Israel Broadcasting Authority 35(1) PD 421 [1980] (Isr.); HCJ 3477/95 Ben Atia v. Minister of Education 49(5) PD 1 [1996] (Isr.).

[178] *See* HCJ 5167/00 Weiss v. Prime Minister 55(2) PD 455 [2001] (Isr.).

[179] In order to evaluate what factors are relevant in the hard cases in which the law does provide them, Barak contends that:

> The relevant interests and values are determined according to the relevant material within which framework the action is examined, and on the basis of the fundamental principles of the system, its 'credo' and the conception of the enlightened public within it . . . *In the absence of legislative guidance, the court must turn to the fundamental values of the nation*, to its "credo," or to its "national way of life," and to "the sources of national consciousness of the people in whose midst the judges reside."

Ressler 42(2) PD 442 at ¶ 40 (emphasis added) (citations omitted).

[180] *See* HCJ 7523/11 Almagor v. Prime Minister (Oct. 17, 2011), Nevo Legal Database (by subscription) (Isr.).

[181] BARAK, *supra* note 165, at 181.

2. Institutional Justiciability

While the normative justiciability concerns the judiciary's capability to decide a case based on a legal standard, the institutional justiciability concerns whether adjudicating the matter in a court of law is appropriate.[182] Justice Barak notes:

> A dispute is institutionally justiciable if it is appropriate for it to be determined by law before a court. A dispute is not institutionally justiciable if it is inappropriate fact to be determined according to legal standards before a court. Institutional justiciability is therefore concerned with the question of whether the law and the courts constitute the appropriate framework for the resolution of a dispute.[183]

Justice Barak discusses five of the six factors discussed in *Baker*, excluding the second factor, under the scope of institutional justiciability.[184] He opposes the conclusion that these considerations should lead to judicial abstention.[185] With respect to the separation of powers argument, Justice Barak holds that "nothing in the separation of powers principle justifies rejection of judicial review of governmental acts, whatever their character or content."[186] Conversely, the separation of powers would be realized when the judiciary is engaged in exercising its judicial function, and the political branches are engaged in political actions. In this fashion, the separation is functional rather than institutional. With respect to other prudential justifications of nonjusticiability, Justice Barak takes a rather careful approach. While pointing out that "the judiciary assesses the legal aspect" of politics, not its advisability,[187] and thus should not abstain from imposing the law merely because the issue is subject to political or public controversy, he acknowledges that other considerations also apply.[188] He contends that the public might not distinguish, in some cases, between judicial review and political review, and "is likely to identify judicial review of the political issue with the issue itself."[189] In such politically charged cases, it is likely that the public may equate the legal determination with a political viewpoint.

For such extremely rare cases, Justice Barak concedes that the question of justiciability may be used as a threshold issue to be resolved first. He acknowledges that applying institutional justiciability considerations in such cases may result in judicial abstention from judgment. Nonetheless, Justice Barak conveys this acknowledgment with a proper warning. He refers to institutional jus-

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[182] *See* Barak, *The Essence of Judicial Activism*, *supra* note 165, at 485–86.
[183] *Ressler* 42(2) PD 442 at ¶ 47.
[184] *Id.*
[185] BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 165, at 184–85.
[186] *Ressler* 42(2) PD 442 at ¶ 52.
[187] *Id.* at ¶ 53.
[188] *Id.*
[189] *Id.* at ¶ 55.

ticiability as a highly problematic doctrine, with "legal foundations [that] are shaky" and one that is justified "to a great extent on irrational grounds."[190] Therefore, he contends, the doctrine "must be approached with caution" and "only in special circumstances." Its revocation would be advised when "the fear of harm to public confidence in the judges outweighs the fear of harm to public confidence in the law, should use of it be considered."[191] The list of such circumstances is not closed and is to be determined by "the judicial life experience and according to the judge's expert sense."[192]

While Justice Barak's judicial approach to justiciability was not entirely accepted among the majority of the justices at the Supreme Court in 1988,[193] his holding was the one that shaped to a large extent the justiciability doctrine of the Israeli law in the years to come, as follows.

D. *Critical Evaluation of Ressler: Was the Israeli Experiment Successful?*

In the aftermath of *Ressler*, the political question was no longer a bar for the court to review cases. The scope of review of the High Court of Justice nowadays encompasses practically every governmental action, whatever the constitutional ground. In recent years, the High Court of Justice has adjudicated cases challenging a wide range of political issues such as the state practice of targeted killings,[194] the legality of the Israel Defense Forces ("IDF") practice of the "Early Warning" procedure during operations to arrest Palestinian suspects,[195] the construction of the security barrier in the West Bank,[196] the power of a "lame duck" government to negotiate peace agreements,[197] a decision to engage in prisoner-swap deals[198] and a decision to award the "Israel Prize" to a contro-

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190 *Id.* at ¶ 56.

191 *Id.*

192 *Id.*

193 The Court President Meir Shamgar accepted the theoretical distinction applied by Justice Barak, but suggested to impose the predominant nature of the topic test, wherein the capacity of the court to address the question on the merits shall be determined by the dominant nature of the question. *Id.* at ¶ 9–10. Justice Elon expressed more radical criticism on Justice Barak's approach. See HCJ 1635/90 Jarjevsky v. the Prime Minister 45(1) PD 749, 762-66 [1990] (Isr.); Daphne Barak Erez, *Evaluation of the Justiciability Revolution*, 50 IBA L. Rev. 1, 5–6 (2008).

194 HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 68(1) PD 507 [2006] (Isr.).

195 HCJ 3799/02 Adalah v. GOC Central Command IDF 50(3) PD 67 [2005] (Isr.).

196 HCJ 7957/04 Zaharan Yunis Muhammad Mara'abe v. The Prime Minister of Israel 60(2) PD 477 [2005] (Isr.); HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel 58(5) PD 807 [2004] (Isr.).

197 *Weiss* 55(2) PD 455.

198 HCJ 7523/11 Almagor v. Prime Minister (Oct. 17, 2011), Nevo Legal Database (by subscription) (Isr.); HCJ 6315/97 Federman v. Prime Minister (Oct. 27, 1997), Nevo Legal Database (by subscription) (Isr.).

versial journalist.[199] Eventually, the circle that began its course in *Ressler* was closed in 2012 when the court found the law exempting Yeshiva students from military service unconstitutional.[200] Twenty-five years of case law provide an opportunity to assess and evaluate the implications and perhaps ramifications of the groundbreaking decision of the court in *Ressler*.

1. Did the Judiciary Intrude Upon the Power of Other Branches of Government?

As noted in *Baker*, the main concern regarding adjudicating cases that involve a political question derives from the separation of powers principle.[201] Arguably, with no justiciability barriers, courts would soon replace the discretion of the political branches and might gain excessive power. The danger, in that sense, is of a "politicization of the judiciary."[202]

While it is unequivocal that the landmark cases of Justice Barak's Court reflect judicial activism in the fullest sense of the term,[203] the Supreme Court has exercised caution and restraint where its decisions could affect political issues. For the most part, petitions regarding policy decisions that clearly involve political questions were dismissed on the merits after the governmental action was found legal or constitutional. Daphne Barak Erez noted that the court completely avoided any intervention in fundamental political issues.[204] While this argument's validity has been put into doubt by the recent decision regarding the military service of Yeshiva students,[205] it still reflects the court's basic approach. Hence, although the rhetoric of nonjusticiability has vanished almost entirely, the "intrusion" of the court into political areas remained limited. Moreover, in cases in which the court intervened, its decisions were clearly based on a solid ground of legal standards.[206]

In lieu of dismissing cases pursuant to a holding of nonjusticiable political questions, the court implemented new doctrines and judicial measures for showing deference to the political branches.[207] First, the court applied the rea-

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[199] HCJ 2205/97 Massalah v. the Minister of Education 51(1) PD 233 [1997] (Isr.).

[200] HCJ 6298/07 Ressler v. The Knesset (Feb. 22, 2012), Nevo Legal Database (by subscription) (Isr.), *English version available at* http://elyon1.court.gov.il/verdictssearch/EnglishVerdictsSearch.aspx.

[201] Baker v. Carr, 369 U.S. 186, 210 (1962).

[202] BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 165, at 186; Yitzhak Zamir, *Judicial Activism: the Decision to Decide*, 17 TEL-AVIV UNIV. L. REV. 647 (1993).

[203] This judicial policy was reflected mostly in the implementation of the constitutional revolution.

[204] *See* Barak Erez, *supra* note 193, at 10–11 (providing examples of landmark cases).

[205] HCJ 6298/07 Ressler v. The Knesset (Feb. 22, 2012), Nevo Legal Database (by subscription) (Isr.), *English version available at* http://elyon1.court.gov.il/verdictssearch/EnglishVerdictsSearch.aspx.

[206] *See, e.g.*, *The Targeted Killings Case*, *supra* note 7.

[207] Barak Erez, *supra* note 193, at 11–16.

sonableness test narrowly with respect to political issues, providing the executive a large margin of deference. By doing so, the court did exercise review over the executive's conduct, conveying a message that such conduct is subject to judicial scrutiny, while in practice showed deference to the political branch standing and expertise in certain areas.[208] Second, the court—particularly under President Dorit Beinisch—abstained from strict review of certain governmental conduct, finding it to be subject merely to "narrow scope of intervention".[209] That term aimed to express reluctance about finding core policy judgments unlawful while once again claiming the issue under the power of review of the court.[210] Interestingly, Barak recently expressed his reservation about the term.[211] Third, when the court found the challenged practice unlawful, the relief was chosen carefully, and in some cases aimed to minimize its practical effect on the prerogative of the government.[212]

The approach taken by the Supreme Court is substantially different from the traditional nonjusticiable approach regarding political questions. Although the court provided relief only in rare cases, its "shadow" (or perhaps it was the shadow of the law) was present whenever the other coordinating political branches have acted. The impact of judicial review cannot be undermined. Its importance for the compliance of all branches of government with the rule of law is unequivocal.[213]

2. Did the Reform Have Ramifications on the Judiciary?

Ressler was no less than a revolution with respect to standing and justiciability. Since it was decided, the judiciary has been involved in practically every political crossroad that Israel has faced for the last twenty years. Cases were brought before the High Court of Justice in all areas of public life in the

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[208] *See, e.g.*, HCJ 4185/90 Mount Temple Loyalists v. Attorney General 47(5) PD 221 [1993] (Isr.) (challenging the police decision to forbid Jewish worshipers to access the Temple Mount).

[209] *See, e.g.*, HCJ 9631/07 Katz v. the President of the State (April 14, 2008), Nevo Legal Database (by subscription) (Isr.).

[210] This doctrine was invoked in cases regarding prisoner-swap deals, the attorney general's decision not to press charges against the public figures, and the Prime Minister's decision to appoint new minister. *See* HCJ 7523/11 Almagor v. Prime Minister (Oct. 17, 2011), Nevo Legal Database (by subscription) (Isr.); HCJ 5675/04 59(1) PD 199 [2004] (Isr.); HCJ 1993/03 The Movement for Quality Government in Israel v. Prime Minister 57(6) PD 817 [2003] (Isr.); *see also* BENDOR & SEGAL, *supra* note 165, at 123 (providing additional examples of cases).

[211] *See* BENDOR & SEGAL, *supra* note 165, at 137–38.

[212] *See* Barak Erez, *supra* note 193, at 14–15.

[213] For example, the legal discourse dominance in strategic and tactical planning of the military nowadays is far-reaching. *See* International Law Department, *The IDF Legal Department Scope of Review*, IDF MILITARY ADVOCATE GENERAL, http://www.mag.idf.il/456-he/Patzar.aspx (last visited May 8, 2012).

country. Some commentators concluded that the justiciability revolution had severe ramifications for the Judiciary.[214] Arguably, the legal review diverts the public discourse regarding a political question from its essence; as predicted by President Meir Shamgar in *Ressler*, "[t]here are cases where consideration of a particular issue according to legal standards alone will miss the point because it is likely to obscure the true nature of the problem under consideration."[215] He contends that focusing on the question of the lawfulness of an act may lead the public opinion to the conclusion that "everything is in order, despite the fact that the decision on the merits is far from satisfactory."[216] Indeed, labeling governmental conduct legal does not provide it with a certification of wisdom or justification. Legal evaluation is not an advisability review. Nonetheless, the distinction between the two is not always readily apparent to the public. Justice Shamgar's concern is clear: in the heat of the legal debate, the public discourse departs from the core issues while focusing merely on whether or not the governmental act is legal. In that regard, the legal review could hamper the public discourse on the core issues, and prevent a healthy political decision making process. Moreover, as a result of the judicial decision that holds an act legal, the Court could be perceived as endorsing the political act in question, and be labeled as politically biased.

This concern is not theoretical. Surveys of the last decade show public confidence in the judiciary in Israel on the decline. According to one survey conducted by the Israel Democracy Institute, public confidence in the court has suffered dramatic decline from 2000 to 2009, dropping from eighty-four percent confidence to fifty-two percent.[217] To some extent, this trend may be attributed to the court's willingness to hear cases regarding controversial political matters.[218] It could prove that the prudential justifications of the political question doctrine are not without merit.[219] The criticism against the court was not limited to popularity surveys. Past justices, commentators and ministers of the government have raised their concerns with the court's justiciability policy.[220]

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[214] For a broad survey of the debate regarding the judicial activism of the Court and the justiciability revolution, *see* RUTH GAVISON, MORDECHAI KREMNITZER & YOAV DOTAN, JUDICIAL ACTIVISM—PROS AND CONS: THE PLACE OF THE HCJ IN THE ISRAELI SOCIETY (2005); *see also* Omer Shapira, *On Justiciability, Judicial Review and Judicial Restraint: Steps to Rebuild the Confidence in the Supreme Court*, 11 LAW & BUSINESS L. REV, 193 (2009).

[215] *Ressler* 42(2) PD 442 at 117 ¶ 10.

[216] *Id.*

[217] Yael Hadar, *The Public Confidence in Governmental Bodies in the Last Decade*, ISRAEL DEMOCRACY INSTITUTE (2010), *available at* http://www.idi.org.il/Parliament/2009/Pages/2009_63/B/b_63.aspx.

[218] *See* Shapira, *supra* note 214, at 194–96.

[219] *See* Hadar, *supra* note 217. It should be stressed that the Supreme Court still holds a better rating than the Executive (i.e., the Prime Minister) and the Knesset, which received ratings of thirty-five percent and thirty-eight percent, respectively.

[220] *See* Shapira, *supra* note 214, at 196–97; Barak Erez, *supra* note 193, at 8–9.

In light of the atmosphere against the judiciary in some circles within the public, several Knesset members proposed bills aiming to draw statutory limitations on the Court's constitutional authority to adjudicate several mostly political issues.[221] None of the legislative initiatives have become law.

What can be concluded, if anything, from twenty-five years of judicial work with almost no justiciability barriers? Should the U.S. follow or avoid such judicial policy? The final part of this article addresses these questions.

IV. APPLYING A BROAD MODEL OF JUSTICIABILITY IN THE U.S.: EVALUATION OF *BAKER*'S FORMULA IN LIGHT OF THE ISRAELI MODEL

It is appropriate to open this section with a reservation. Proposals of judicial policies that rely on comparative analysis must be taken with caution, especially when made in the realm of constitutional law.[222] Each country has its own constitutional infrastructure; each society has its own fundamental values; and each nation has its own national way of life. Nevertheless, lessons and development in the law can stem from looking outside, and conclusions based on the experience of one legal system can facilitate necessary changes in another one.

The ultimate conclusion suggested in this article is to limit the applicability of the political question doctrine to extremely rare cases that would be rationalized on prudential justifications, mainly linked to the concern of political legitimacy of the judiciary. This part presents the rationale of the proposed model by addressing the main categories of justifications of the doctrine, as discussed by Justice Sotomayor in *Zivotofsky*, and based on *Baker*'s six factors test.[223]

A. *Courts Never Lack Constitutional Authority to Adjudicate Cases*

Baker's first factor contends that nonjusticiability may be advised when a court finds "textually demonstrable constitutional commitment of the issue to a coordinate political department."[224] Is lack of constitutional authority to resolve an issue a valid argument for nonjusticiability? The answer depends, to a great extent, on the way we define the constitutional allocation of powers and the separation of powers maxim. The Constitution allocates the governmental pow-

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[221] *See* A Bill For an Act Entitled Basic Law: the Judiciary (Amendment – Powers of the High Court of Justice), codified P/3416/18 (July 25, 2011); A Bill for an Act Entitled Basic Law: Limitations on the powers of the Judiciary, codified P/41 (Mar. 10, 2003).

[222] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (reflecting a varieity of views with respect to the application of comparative standards of constitutional law); Donald E. Childress, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003).

[223] *See* BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 165, at 184–85 (rejecting the validity of considerations regarding respect for coordinate departments, adherence to a political decision already made or a concern of embarrassment).

[224] Baker v. Carr, 369 U.S. 186, 217 (1962).

er among the three branches of government. Indeed, some powers were given exclusively to one branch. However, "entrusting a decision about a certain act to a branch of state does not mean that the question of the legality of that act is also entrusted to that branch of the state."[225] Such a proposition scrapes the fabric of the separation of powers: if the same branch performs the act and reviews its legality, the functions of power are hardly separated. Conversely, in such a case, one branch excludes all others and monopolizes the entire governmental powers. The separation of powers condemns this state of affairs. It requires that the organ invested with the political power to act would weigh political considerations and fulfill its political function, and that the judiciary would review the legality of the act, hence carrying out its judicial function. The Constitution prescribes this expressly in Article III, Section 1, providing that "[t]he *judicial Power* of the United States, shall be vested in one Supreme Court, and in such inferior Courts."[226] When the political branch that holds the political power claims the power to review its own legality exclusively, it actually claims the constitutional authority to exercise judicial power. This notion cannot be reconciled with the separation of powers.

Yet, we should bear in mind that the judiciary is also bound by the separation of powers. Reviewing the legality of an act compels the judiciary to consider merely legal considerations. Justice Barak noted:

> The political and the legal realms are distinct from each other. The judiciary assesses the "legal aspect" of politics, not its advisability. Accordingly, when a judge assesses the legality of a political determination, he is not concerned—neither positively and nor negatively—with the merits of that determination. He does not make himself a part of it. He does not assess its internal logic, but examines only its legality according to legal standards. In doing so, he fulfills his classic role.[227]

Mandating the judiciary to exercise judicial review and the rest of the branches to exercise their own political (executive and legislative) capacity realizes the separation of powers. Accordingly, constitutional commitment of an issue to a coordinate political department does not commit all governmental functions regarding that issue.

Consider the following example discussed by Justice Sotomayor in *Zivotofsky* as an illustration of a nonjusticiable political question:[228] Congress passed a statute, purporting to award financial relief to those improperly "tried" of impeachment offenses. In such cases, it is wrong to assume that a legal review would inevitably intrude on the constitutional prerogatives of the Senate by imposing its own procedures to review whether the trial was improper. Rather, it would be compelled to interpret the term "improperly," in the face of the

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[225] BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 165, at 184. .

[226] U.S. CONST. art. III, § 1 (emphasis added).

[227] HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 442 at ¶ 53 [1988] (Isr.)

[228] Zivotofsky v. Clinton, 132 S. Ct. 1421, 1435 (2012).

constitutional provision, prescribing "sole" power to the Senate holding impeachment trials. The legal issue of this case would be whether the Senate employed improper trial proceedings according to its constitutional authority. It has sole power, but is compelled by the Constitution to hold a trial. Now, if the merits show that impeachment was decided before the procedure, or that the Senate ruled before hearing the plaintiff, the court may conclude that the Senate exceeded its constitutional authority and thus that the trial was improper. This is an ordinary judicial function of constitutional and statutory interpretation. The outcome of adjudicating the case would be to subsume the Senate's exercise of power by the Constitution.

B. *Courts Have a Constitutional Duty to Devise the Appropriate Legal Standard*

Baker's second factor justifies nonjusticiability when a court finds that an issue cannot be resolved by judicially discoverable and manageable standards. Justice Sotomayor found merits in this justification in *Zivotofsky*, noting "where an issue leaves courts truly rudderless, there can be 'no doubt of [the] validity' of a court's decision to abstain from judgment."[229] As illustrated by several cases discussed in Part II, devising an appropriate legal standard of review without textual constitutional or statutory guidance may be elusive. It does not however show that a challenged governmental act is not encompassed by a legal standard. The Israeli example shows that criteria can be devised in accordance with general principles of law and through other constitutional frameworks. The rule of law cannot be reconciled with the judiciary abstaining from exercising review merely because devising the legal standard is difficult.

Consider for example the merits discussed in *Veith*.[230] A plurality of the Court concluded that the lack of success in formulating a workable standard shows that the question is political, rather than legal. Such a conclusion is regrettable. By approving the congressional redistricting plan, Pennsylvania's General Assembly exercised its constitutional powers. Constitutional authorization is not unlimited, in the sense that it was given by the people for the purpose of performing governmental powers for the people. A plurality of the court found the action not bound by legal standards. The instant outcome of excluding judicial review of the redistricting plan was designed to "cre[ate] an area in which there is law, but no judge. The real import of this outcome is that there is neither law nor judge."[231] When the judiciary abstains from reviewing an act, the law loses its grip on it. Then, the "might makes right" rule is the only one feasible, and the party holding the hot seat can act in its own way. Did the state constitution grant the General Assembly the power to conduct redistricting in order to provide it with a tool to preserve its dominion or the reelec-

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229 *Id.*

230 Veith v. Jubelirer, 541 U.S. 267 (2004).

231 *Ressler* 42(2) PD 442 at ¶ 53.

tion of its incumbents? This is a question for the courts to resolve. However, when the court abstains, the law remains silent. As the Israeli doctrine of normative justiciability contends, all governmental conduct is empowered by a legal or constitutional provision. In that sense, it is a pure exercise of judicial power to decide whether that same conduct complies with the law or infringes upon it.

Other than in counterterrorism cases, the general standard of review applied by the Israeli Supreme Court is the reasonableness standard. It has been criticized and found inappropriate by many jurists in Israel as well as in the U.S.,[232] and I wish to refrain from arguing whether it is suitable to U.S. jurisprudence. However, I do contend that when a political branch carries out its role in a democracy, its actions are bound by the law, and must be reviewed by the courts based on legal standards. The formulation of some standards may be obscure, but it does not change the fact that it is the judiciary's role to devise the appropriate standard. There is no basis for nonjusticiability on a lack-of-judicial-standard justification.

C. *Prudential Considerations Should Govern in Extremely Rare Cases*

The rest of *Baker*'s factors justify nonjusticiability on the grounds of prudence. Should prudential considerations be recognized as valid grounds for a court to abstain from judgment? Justice Barak acknowledged the applicability of institutional nonjusticiability reasoned by prudence in extremely rare circumstances, when "the fear of harm to public confidence in the judges outweighs the fear of harm to public confidence in the law, should use of it be considered."[233] Despite this rhetoric, in the twenty-five years since the *Ressler* decision, the Supreme Court of Israel has found practically every issue that came before it justiciable.[234] Instead of nonjusticiability, the Court has practiced judicial restraint in adjudicating politically charged issues,[235] and granted judicial relief in specific cases in which a clear judicial standard was applicable or when basic human rights were at stake.[236] Nonetheless, the developments in Israel in the aftermath of *Ressler* might imply that Justice Barak's policy underestimated the validity of prudential considerations concerning the confidence of

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[232] *See* Posner, *supra* note 166; Moshe Landau, *On Justiciability and Reasonableness in Administrative Law*, 14 Tel Aviv L. Rev. 5 (1989).

[233] *Ressler* 42(2) PD 442 at ¶ 56.

[234] The known exceptions are the review of political agreements (HCJ 1635/90 Z'arz'evsky v. the Prime Minister 48(1) PD 749 [1991] (Isr.)), the legality of the settlements in Gaza and the West Bank (HCJ 4481/91 Bar-Gil v. the Government of Israel 47(4) PD 210 [1993] (Isr.)) and the legality of the Government decision to enter agreements or engage in peace talks (HCJ 4877/93 The Organization of the Victims of International Arab Terrorism v. the State of Israel (Sept. 12, 1993), Nevo Legal Database (by subscription) (Isr.)).

[235] *See* Barak Erez, *supra* note 193, at 11–14.

[236] *Id.* at 26–27.

the public with the judiciary.[237] When the Supreme Court found the practice of targeted killings to be lawful, it was held by several human rights groups to be indifferent to human rights and to act as a subdivision of the government,[238] but when it compelled the government to remove unlawful outposts at the West Bank, right wing Knesset members blamed it for favoring the Arab political interests.[239]

Indeed, "the political and the legal realms are distinct from each other . . . When a judge assesses the legality of a political determination, he is not concerned—neither positively and nor negatively—with the merits of that determination."[240] Regrettably, large portions of the public fail to make a distinction between the political and legal realms, and affiliate the court with the political implications of its decisions. While courts should not act according to popularity, they must hear the voices of the people, and not overlook such considerations completely. Nevertheless, we should bear in mind that abstention also takes its toll with respect to the confidence of the public in the judiciary. When the judiciary remains silent in face of unlawful governmental practices, the ramifications to court competency and legitimacy might be severe.

In what circumstances then, is abstention on grounds of prudence appropriate? The Israeli model fails to provide a concrete answer. Justice Barak's formula, which equates the fear of the confidence in the judges in case of addressing the issue on the merits with the fear of the public's confidence in the law in case of abstention is vague and was never adopted as an applicable test.[241] *Baker*, while providing four prudential factors to consider, may advocate nonjusticiability on far too many issues.[242] Some of *Baker*'s factors overlook the fundamental constitutional duty of the courts to say what the law is, even when it is unpopular. That a judgment could have implications on policy determinations, that it expresses lack of respect for a coordinate branch or political decision already made, or that it might cause embarrassment, should not

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[237] *See* Hadar, *supra* note 217; Shapira, *supra* note 214, at 194–96.

[238] Maruan Dalal, *Bridging between Law, Life and Executions*, 32 Adalah Rev. e. issue (2007), *available at* http://adalah.org/newsletter/heb/jan07/comi.pdf.

[239] *See, e.g.*, the Migron affair in HCJ 8887/06 Al Nabut v. the Minister of Defense (August 2, 2011), Nevo Legal Database (by subscription) (Isr.), where the Supreme Court ordered the Minister of Defense to remove the illegal outpost Migron by March 31, 2012. The Government attempted to reach a deal with the settlers of Migron in order to secure peaceful enforcement of the judgment, and filed a motion to stay the decision until 2015. On March 25, 2012 the court declined to grant the motion. In response, Knesset Member Arye Eldad was quoted saying "the HCJ has proven today, once again, that it favors the Arab interest over the Jewish settlement movement . . . . " *See* Yishay Karov, *The HCJ rejects the Migron Agreement*, ARUTZ 7 (Mar. 25, 2012), http://www.inn.co.il/News/News.aspx/235665.

[240] *Ressler* 42(2) PD 442 at ¶ 53.

[241] *Id.* at ¶ 56.

[242] Baker v. Carr, 369 U.S. 186, 217 (1962).

outweigh this basic constitutional duty. When a court refuses to adjudicate a legal dispute because it might be embarrassing or demonstrate lack of respect to another branch of government, it is demonstrating a disrespect of the law and a denial of its constitutional duty. Prudence must counsel against such judicial policy.

Indeed, finding the balance between the constitutional duty to hold legal review and the concern of decline in the political legitimacy of the judiciary is challenging. I contend that prudence should lead to nonjusticiability in extremely rare cases and be subject to a four-prong test. The application of the four-prong test aims to answer whether adjudicating the case would lead to loss of public confidence in the judiciary to an extent that justifies nonjusticiability. The four prongs are the following: (1) does resolving the case compel the court to hold a political, social, or economical determination that is more appropriate for a political branch and the public sphere to resolve; (2) does rendering a judgment adversely affect the public confidence in the judiciary; (3) does another branch compel the acting branch to uphold the law despite the abstention of the judiciary; (4) does the act in question infringe upon basic individual rights.

A court should consider an issue nonjusticiable only when resolving the issue is more appropriate for another branch of government; when addressing the issue on the merits would adversely affect public confidence in the judiciary; when it is foreseeable that another department would supervise that the law is upheld; and when the case does not involve infringement of basic individual rights. The circumstances in which this test would be met are extremely rare. Determination of nonjusticiability must be the outcome of judicial discretion and not of a lack of constitutional authority.

D. *Illustrating the Differences: the Targeted Killings Issue as a Test Case*

At its core, the law is a social instrument designed to regulate the conduct of legal entities acting together in a society.[243] Where there is no supervision of the law and its agencies, the conduct of those entities will be left unregulated and is expected to be less accountable to its externalizations. In this regard, the justiciability policy that a legal system chooses to apply implicates not only the conduct of courts, but on all those who act within the legal system. Government agencies that act in a sphere unsupervised by the judiciary (and therefore the law) would adjust their behavior accordingly and would be less expected to act in accordance with legal limitations imposed on them. The final remarks of this article illustrate the implications of the two models of justiciability, on the judiciary as well as the relevant governmental agencies, through the targeted kill-

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[243] *See* H.L.A. HART, THE CONCEPT OF LAW (A. Bulloch & Joseph Raz eds., 1994); Joseph Raz, *The Authority of Law: Eassays on Law and Morality*, *in* THE FUNCTIONS OF LAW (1979).

ings issue, a practice that has been adopted by both administrations but addressed differently by the judiciaries of each state.

In their counterterrorism efforts, both the U.S. and Israel have engaged in a state policy of targeted killings. However, while in Israel the issue was brought under the scrutiny of the Supreme Court, in the United States, it constitutes a nonjusticiable political question. The implications of the different judicial approaches are far reaching.

Israel has been practicing its targeted killings policy since 2000,[244] and employed over 300 attacks during the last thirteen years.[245] In 2002, a petition was brought before the Israeli Supreme Court, requesting the court to declare that the government policy was unlawful.[246] President Barak dismissed arguments of nonjusticiability and addressed the case on the merits.[247] While the petition was eventually denied, President Barak delineated the legal outlines of a state practice of targeted killing, rendering a judgment that constitutes the first abstract binding determination of conditions and modalities for the international (and domestic) lawfulness of targeted killings.[248] Following the decision, the Air-Force policy was adjusted accordingly, as the legal boundaries of the policy set by the court have been embodied deep within the military practices. In effect, as a result of the Supreme Court judicial policy on the issue of counterterrorism, the dominance of the legal discourse in strategic and tactical planning of the Israeli military nowadays is unequivocal.[249] The message conveyed by

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244 The first attack was employed on Tanzim activist Hussein A'bayat when Hellfire missiles launched from Israeli Air-Force AH-64 helicopters targeted him. *See* Orna Ben-Naftali & Keren R. Michaeli, *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 234–35 (2004). Israel publicly admitted to adopting a state policy of targeted killings since February 14, 2001, when the Israeli Deputy Minister of Defense, Ephraim Sneh, declared that "[w]e will continue our policy of liquidating those who plan or carry out attacks, and no one can give us lessons in morality because we have unfortunately one hundred years of fighting terrorism." NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 29 (2008).

245 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, at 6, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

246 *See* HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel 68(1) PD 507 [2006] (Isr.). Shortly before, a panel of the Supreme Court held a similar case nonjusticiable. *See* HCJ 3114/02 Barakeh v. Minister of Def. 56(3) P.D. 11 [2002] (Isr.).

247 *See* Eric Berlin, Note, *The Israeli Supreme Court Targeted Killings Judgment: a Reaffirmation of the Rule of Law during War*, 21 MICH. ST. U. COLL. L. INT'L L. REV. 517, 537–43 (2013) (discussing the justiciability of the case).

248 *See* MELZER, *supra* note 244, at 33; Kristen E. Eichensher, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1881 (2007).

249 *See* International Law Department, *About—International Law Department*, IDF MILITARY ADVOCATE GENERAL, http://www.mag.idf.il/456-he/Patzar.aspx (last visited Nov. 4, 2013).

the court in holding the issue justiciable was even greater than the judgment itself: that Israel's counterterrorism efforts are bound by legal norms and the rule of law.

The United States employs a similar counterterrorism strategy of targeted killings in its war against al-Qaeda and associated forces.[250] While President Obama's administration admitted practicing targeted killings as a national security policy,[251] the government refuses to disclose official information regarding the legal basis, the scope, the number of people killed and other related information with respect to the targeted killings program.[252] In 2010, a suit was brought before the D.C. District Court by Nasser Al-Aulaqi against the President, the Secretary of Defense, and the Director of the Central Intelligence Agency ("CIA"), claiming that his son, Anwar al-Aulaqi, an American citizen hiding in Yemen at the time for having alleged ties to al-Qaeda, was unlawfully included in the CIA's and The Joint Special Operations Command's "kill list".[253] The plaintiff sought an injunction prohibiting the government from intentionally killing Anwar Al-Aulaqi.[254] The defendants filed a motion to dismiss and the District Court granted it, inter alia on grounds of a nonjusticiable political question.[255] The opinion of the court found the question beyond the scope and constitutional authority of judicial review,[256] and argued that the judiciary is not equipped with the necessary tools to second-guess the government discretion.[257] On September 30, 2011, an airstrike carried out by an unmanned drone aircraft in Yemen killed Anwar al-Aulaqi.[258]

Government officials also consider the issue nonjusticiable. Jeh Johnson, General Counsel of the Department of Defense, cited the judgment noting that "the judicial branch of government is simply not equipped to become involved

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[250] *See* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Speech at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

[251] *Id.*; Jeh Johnson, General Counsel, U.S. Dep't of Defense, Dean's Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), *available at* http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school.

[252] New York Times Co. v. United States, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

[253] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010).

[254] *Id.* at 8.

[255] *Id.*

[256] *Id.* at 50. (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 849 (D.C. Cir. 2010) ("[T]here is no constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target.")).

[257] *Id.* at 52 ("[Judges] cannot reasonably or appropriately determine if a specific military operation is necessary or wise.").

[258] Mark Mazzetti, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all.

in targeting decisions."[259] A Department of Justice White Paper reaffirmed this position.[260] The paper provides details on the legal grounds for targeting American citizens, and contends with regard to the justiciability issue that "there exists no appropriate judicial forum to evaluate these constitutional considerations" and that "such matters 'frequently turn on standards that defy judicial application.'"[261]

The outcome of the approach taken in the White Paper is that the U.S. Government claims to have the legal power to kill American citizens without judicial supervision. Although the administration admits to be bound by the Constitution and norms of the International Law of War,[262] when a court cannot oversee the application of the law, it is all up to the good will of the executive. I argue that this is not a proper manner of holding judicial review over the Government. Indeed, DOJ White Papers and non-binding remarks cannot substitute for judicial review. The D.C. District Court's abstention from addressing the legal issues of targeted killings on their merits is an illustration of the risks of a broad application of the political question doctrine. It is erroneous in regard to the justiciability principles discussed in this article. First, when the executive claims constitutional power, the judiciary has a constitutional duty to supervise the exercise of that power in accordance with the Constitution and other applicable legal norms. Second, the lack-of-judicial-standard justification is without merit. When the government claims that the targeted killings program is in compliance with the Constitution and the International Laws of War,[263] it seems unpersuasive to assert that there are no judicially manageable standards for reviewing the case. In *al-Aulaqi*, the court accurately held that judges cannot "appropriately determine if a specific military operation is necessary or wise,"[264] but in effect this was not the question for the court to address. The judicial function in reviewing a targeted killings case is only to determine whether the program is employed in compliance with the applicable legal

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[259] Johnson, *supra* note 251.

[260] Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al-Qaeda or an Associated Force, at 10, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

[261] *Id.*

[262] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (quoted in STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 397–99 (5th ed. 2011)); Eric Holder, Attorney General of the United States, Remarks at Northwestern University Law School (Mar. 5, 2012), *available at* http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/#mare-6236.

[263] *Id.*

[264] Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 52 (D.D.C. 2010) (quoting DaCosta v. Laird, 471 F.2 1146, 1155 (2d Cir. 1973)).

norms. To determine that it is lawful, or unlawful, does not imply anything with regard to the advisability or necessity of it, both functions of the executive. To a great extent, the Israeli *Targeted Killings Case* is a clear demonstration of the distinction between the executive and the judicial functions. And ultimately, prudential considerations of nonjusticiability are also not applicable in these circumstances, as the conditions set forth in the four-prong test suggested in this article are not satisfied. First, rendering judgment does not compel the court to make a policy determination, but rather to evaluate the legality of a policy decided by the executive. Second, there are no grounds to assume that addressing the issue would adversely affect the public confidence in the judiciary. Third, there are no alternative forums that could supervise the application of the law if the judiciary abstains from judgment. Fourth, the issue of the case affects basic individual rights.

CONCLUSION

Invocation of the political question doctrine upon certain powers exercised by branches of the government has far-reaching consequences. It takes a specific function of governmental action beyond the scope of legal review. While this article discusses apparent jurisprudential distinctions between Israel and the United States on the question, it may be argued that, in practice, the results are the same: for the last fifty years, rarely has the U.S. Supreme Court found the political question doctrine applicable and held cases nonjusticiable. Yet, a closer look at the entire court system would suggest otherwise. Dating back to *Marbury v. Madison*, the political question doctrine is rooted within all departments of government, advocating the notion that certain conduct is not reviewable by the judiciary. *Zivotofsky* illustrates how central the doctrine is in all levels of the judiciary. Its implications are not limited to the conduct of courts. Nonjusticiability has a tremendous affect on the conduct of the political departments as well: when the shadow of the judiciary, and thus the law, is not present, government officials may act their own way.

This article contends that courts always have constitutional authority to decide what the law is, and that judicial standards of review are devisable for any legal question. Keeping legal review on governmental acts is essential for preserving the rule of law and the separation of powers. While judicial power should be exercised with respect to the coordinate departments, it must also be exercised with respect for the law. Judicial abstention should be preserved for the rarest of cases. While acknowledging the price we pay when abstention is invoked, I recommend limiting nonjusticiability of political questions to prudential considerations and subject to a four-prong test. Other than this limited set of circumstances, the judiciary should maintain its constitutional duty to adjudicate the cases before it.