

6-2016

# Is the Political Question Doctrine Jurisdictional or Prudential?

Ron Park

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### Recommended Citation

Ron Park, *Is the Political Question Doctrine Jurisdictional or Prudential?*, 6 U.C. IRVINE L. REV. 255 (2016).  
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## Is the Political Question Doctrine Jurisdictional or Prudential?

# Is the Political Question Doctrine Jurisdictional or Prudential?

Ron Park\*

*In Corrie v. Caterpillar, Inc., the family members of protestors killed or injured by bulldozers driven by the Israeli Defense Forces sued the manufacturer of the bulldozers in federal district court. The Ninth Circuit affirmed the dismissal of the lawsuit after holding the issues nonjusticiable under the political question doctrine. In doing so, the Ninth Circuit held that the political question doctrine was jurisdictional. As of this moment, only the Ninth Circuit has explicitly answered the question of whether the political question doctrine is jurisdictional or prudential. The Supreme Court has not answered that question and no other Circuit Court of Appeals has done so either.*

*This Note attempts to answer that question by making the factors articulated in the Supreme Court's key opinion on the political question doctrine, Baker v. Carr, the central focus of its analysis. In doing so, this Note concludes that the political question doctrine is either jurisdictional or prudential depending on which factor is invoked. The first Baker factor is jurisdictional because it is the only factor that explicitly grounds itself in the Constitution. The remaining five Baker factors are prudential because they ask courts to consider things that are aligned with the Court's prudential doctrines, such as ripeness.*

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\* The author would like to thank Dean Erwin Chemerinsky and the members of the UC Irvine Law Review Board for their invaluable guidance and support throughout the process of writing this Note.

Introduction .....	256
I. What Is the Political Question Doctrine? .....	259
A. Early History.....	259
1. Republican Form of Government (Guaranty Clause) Cases.....	259
2. Foreign Relations Cases .....	260
B. Modern Formulation .....	261
C. The Supreme Court's Political Questions Post- <i>Baker</i> .....	262
II. Why It Matters Whether the Doctrine is Jurisdictional or Prudential.....	263
III. Source of the Political Question Doctrine.....	265
A. The Difference Between the Political Question Doctrine and Other Justiciability Doctrines.....	265
B. The Political Question Doctrine's Source .....	266
1. How Factor One Preserves Separation of Powers.....	266
2. How Factor Two Preserves Separation of Powers .....	267
3. How Factor Three Preserves Separation of Powers .....	268
4. How Factor Four Preserves Separation of Powers.....	269
5. How Factor Five Preserves Separation of Powers.....	269
6. How Factor Six Preserves Separation of Powers .....	270
IV. Why the Doctrine is Both Jurisdictional and Prudential .....	271
A. The Jurisdictional Component .....	272
B. The Prudential Components .....	273
1. Prudential Factors Two and Three: Decision-Making Beyond a Court's Competence .....	274
2. Prudential Factors Four, Five, and Six: Disrespect and Embarrassment Counseling Against Judicial Review.....	276
V. How to Apply the Doctrine Under This Framework.....	278
Conclusion.....	280

## INTRODUCTION

In *Corrie v. Caterpillar, Inc.*, the family members of protestors killed or injured by bulldozers driven by the Israeli Defense Forces sued the manufacturer of the bulldozers in federal district court.<sup>1</sup> The Ninth Circuit affirmed the dismissal of the lawsuit after holding the issues to be political questions under the political question doctrine.<sup>2</sup> In doing so, the Ninth Circuit also held that the political question doctrine was a jurisdictional doctrine.<sup>3</sup>

This holding had important consequences. If a doctrine is jurisdictional, courts

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1. 503 F.3d 974, 977 (9th Cir. 2007).

2. *Id.* at 983 (“[W]e hold that plaintiffs’ claims are nonjusticiable under the first *Baker* test.”).

3. *Id.* at 982 (“We hold that if a case presents a political question, we lack subject matter jurisdiction to decide that question.”).

are obligated to address the issue before reaching the merits.<sup>4</sup> Even if neither party raises the issue, courts can raise it *sua sponte* and look beyond the facts in the pleadings to determine the issue.<sup>5</sup> Moreover, the issue cannot be forfeited or waived, so that at any moment in the litigation the issue can be raised and the case decided on that ground.<sup>6</sup>

The consequences of declaring the political question doctrine jurisdictional are particularly high. Other justiciability doctrines address the parties to the case or the factual context of the proceedings. Standing ensures that the proper plaintiff is before the court.<sup>7</sup> Mootness ensures that the court is resolving an actual case or controversy.<sup>8</sup> Ripeness ensures that the court is adjudicating a case at the proper point in time.<sup>9</sup> Each of these doctrines leaves open the possibility of later adjudication of the case once the proper plaintiff is found or the facts of the case are properly developed. The political question doctrine addresses the issue of the case itself.<sup>10</sup> Once a question is deemed political, the court will never hear the case.<sup>11</sup> Moreover, in the case of *Corrie*, had the Ninth Circuit declared the political question doctrine to be prudential rather than jurisdictional, it would not have been able to look beyond the face of the complaint and the court may not have been able to conclude the way it did.

As of this writing, only the Ninth Circuit has explicitly answered the question of whether the political question doctrine is jurisdictional or prudential. In 1962, the

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4. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (“[T]he first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.” (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900))).

5. *Corrie*, 503 F.3d at 979 (“Only if the doctrine is jurisdictional may we look beyond the facts alleged in the complaint to decide whether this case presents a political question.”).

6. *Steel Co.*, 523 U.S. at 93 (stating that jurisdictional arguments “would have to be considered by this Court even though not raised earlier in the litigation—indeed, this Court would have to raise them *sua sponte*”).

7. *See* *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”). *See also* Caprice L. Roberts, *Asymmetric World Jurisprudence*, 32 SEATTLE U.L.REV. 569, 585 (2009) (describing standing doctrine as communicating “not you”).

8. *See* *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). *See also* Roberts, *supra* note 7, at 585 (“[M]ootness represents the notion of ‘too late.’”).

9. *See* *Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 140 (1974) (describing ripeness as “a question of timing”). *See also* Roberts, *supra* note 7, at 584–485 (“[R]ipeness represents the notion of ‘not yet.’”).

10. *See, e.g.,* *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1424–425 (holding that whether a statute allowing Americans to list “Israel” as their place of birth on their passports must be given effect does not present a political question); *Nixon v. United States*, 506 U.S. 224, 226 (1993) (concluding that whether the Senate properly impeached a federal judge is a political question); *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that a challenge to legislative apportionment presents “no nonjusticiable ‘political question’”).

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“Questions, in their nature political . . . can never be made in this court.”). *See also* Roberts, *supra* note 7, at 585 (“The political question doctrine, however, if deemed applicable by the Court, means the Court will never hear the case.”).

Supreme Court decided *Baker v. Carr*, a case where it articulated the six factors a court must consider when applying the political question doctrine.<sup>12</sup> But the Supreme Court did not answer in *Baker* or in any other case whether the political question doctrine is jurisdictional or prudential, and no other Circuit Court of Appeals has explicitly done so either.<sup>13</sup> In fact, the question recently came up in the Kansas Supreme Court in the case of *Kansas Building Industry Workers Compensation Fund v. State*.<sup>14</sup> The Kansas Supreme Court did not explicitly answer the question, but the court's analysis treated the doctrine as jurisdictional.<sup>15</sup>

A number of scholars have attempted to fill the void: some have argued that the doctrine is jurisdictional,<sup>16</sup> some have argued it is prudential,<sup>17</sup> and some have even suggested the doctrine is a fiction.<sup>18</sup> While a few of these articles have examined the *Baker* factors,<sup>19</sup> none has made the factors the central focus of its analysis. This Note puts the *Baker* factors front and center in analyzing the question of whether the political question doctrine is jurisdictional or prudential. Considering that all political questions are determined by applying the *Baker* factors, the question of whether the doctrine is jurisdictional or prudential should be determined based on an analysis of the factors themselves.

This Note concludes that the political question doctrine is either jurisdictional or prudential depending on which factor is invoked. The first *Baker* factor is jurisdictional. The remaining five *Baker* factors are prudential. Part I of this Note provides an overview of the history of the political question doctrine and its current status in the Supreme Court's jurisprudence. Part II explains the implications of pronouncing the doctrine jurisdictional or prudential. Part III discusses the source

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12. 369 U.S. at 217.

13. A few Circuits have suggested that the doctrine is jurisdictional. *See* *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 407 n.9 (4th Cir. 2011) (noting that the judiciary is "deprived of jurisdiction" when the political question doctrine is implicated); *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (stating that political questions are "nonjusticiable" because there is a difference between finding "no federal jurisdiction" versus declaring that a particular matter is "inappropriate for judicial resolution"); *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (treating the political question doctrine as jurisdictional); *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 164 (2d Cir. 2000) (declaring the political question doctrine as "essentially a constitutional limitation on the courts"). However, some of these same Circuits have expressed doubts on the matter. *Hegab v. Long*, 716 F.3d 790, 800 n.4 (4th Cir. 2013) (noting that the Supreme Court has not ruled on the matter one way or the other). *Cf. Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (stressing the need to distinguish among a failure to state a claim, a claim that is not justiciable, and a claim over which the court lacks subject matter jurisdiction, and pointing to the political question doctrine as an example of where the court has not been consistent about maintaining those distinctions).

14. 359 P.3d 33, 41 (Kan. 2015).

15. *Id.* at 42.

16. *See, e.g.*, Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

17. *See, e.g.*, ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183-92 (1962).

18. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

19. *See, e.g.*, Roberts, *supra* note 7, at 569; Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005).

of the political question doctrine and why it springs from separation of powers principles and not Article III of the Constitution. Part IV discusses each *Baker* factor and explains why the first is jurisdictional and the other five are prudential. Finally, Part V provides guidance on how courts are to apply the political question doctrine in light of this Note's conclusion.

## I. WHAT IS THE POLITICAL QUESTION DOCTRINE?

### *A. Early History*

For much of U.S. history, there was no clearly defined political question doctrine. Instead, there were various issues that the Supreme Court thought were properly resolved by the political branches. For example, cases arising under the Guaranty Clause of the Constitution and cases relating to various aspects of foreign relations were held to be nonjusticiable political questions.<sup>20</sup>

#### *1. Republican Form of Government (Guaranty Clause) Cases*

Beginning with *Luther v. Borden*,<sup>21</sup> the Court consistently held claims arising under the Guaranty Clause of the Constitution<sup>22</sup> to be nonjusticiable political questions. In *Luther v. Borden*, the Court declared that it rested with Congress to decide whether a State government was a “republican form of government” as required by the Constitution, going so far as to state that Congress’s decision “could not be questioned in a judicial tribunal.”<sup>23</sup>

The facts of *Luther* involved an action for trespass—an action that the defendants sought to justify by claiming they were acting under the authority of the lawful government of Rhode Island to suppress an insurrection.<sup>24</sup> The question presented to the Court was whether the government under which the defendants claimed authority was in fact the lawful government of Rhode Island at the time of the alleged trespass.<sup>25</sup> Although the Guaranty Clause did not explicitly identify Congress as the body to decide that question, the Court held that Congress was the proper authority because it was the branch that decides whether to admit the senators and representatives of a particular state into itself.<sup>26</sup>

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20. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

21. *Id.*

22. U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

23. 48 U.S. at 42.

24. *Id.* at 34.

25. *Id.* at 35. The Court also identified the question as a “very serious one” that would potentially nullify all manner of state action that occurred since the time when the state government allegedly ceased to exist. *Id.* at 38–39. This concern was reiterated and expanded upon in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 141–42 (1911). However, in neither case did the Court explicitly hold that the question was nonjusticiable because of these concerns.

26. 48 U.S. (7 How.) at 42. Although it did not do so, the Court could have pointed to Article IV, Section 3 of the Constitution to support its reasoning. Section 3 states that “[n]ew States may be

Claims brought under the Guaranty Clause since *Luther* have all been declared nonjusticiable without much additional comment on the subject.<sup>27</sup>

## 2. Foreign Relations Cases

The Court has also often held questions to be political in matters implicating foreign relations. In *Doe v. Braden*, the Court refused to consider the validity of certain provisions of a treaty, concluding that “the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.”<sup>28</sup> This was because the Constitution assigned the powers relating to foreign relations to the President, including the power to make treaties (provided two-thirds of the Senators concur).<sup>29</sup> The Court also added that it would be “impossible” for the executive department to conduct foreign relations if “every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power . . . to make the engagements into which he entered.”<sup>30</sup>

In *Terlinden v. Ames*, a case involving the continuing existence of a treaty, the Court declared that “the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.”<sup>31</sup> The Court cited back to *Doe* in support<sup>32</sup> and elaborated that it could not declare the treaty terminated when both the governments of the United States and the German Empire asserted otherwise.<sup>33</sup> Since these cases, the existence of treaties and the validity of their provisions have generally been held to be political questions.<sup>34</sup>

Beyond treaties, the Court has also declared questions on sovereignty over a territory to be political.<sup>35</sup> Sovereignty as a political question can be traced back to

admitted by the Congress into this Union.” U.S. Const. art. IV, § 3. This language supports the idea that Congress is also the guarantor of a republican form of government.

27. See, e.g., *State of Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit County*, 281 U.S. 74, 79–80 (1930); *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, 234 (1917); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *O’Neill v. Leamer*, 239 U.S. 244, 248 (1915); *Marshall v. Dye*, 231 U.S. 250, 256 (1913); *Pacific States*, 223 U.S. at 143; *Taylor v. Beckham*, 178 U.S. 548, 578 (1900).

28. 57 U.S. (16 How.) 635, 657 (1853).

29. *Id.*

30. *Id.*

31. 184 U.S. 270, 288 (1902).

32. *Id.* at 288–89.

33. *Id.* at 289–90.

34. See, e.g., *Clark v. Allen*, 331 U.S. 503, 514 (1947); *Charlton v. Kelly*, 229 U.S. 447, 476 (1913) (holding that since the Executive Department waived any right to free itself from the obligations imposed by the treaty, the “plain duty” of the Court was to recognize those obligations), *Cf. Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303, 311 (2d Cir. 1982) (holding that selecting a unit of conversion for limiting liability under the Warsaw Convention was a political question).

35. See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302–03 (1918); *Jones v. United States*, 137 U.S. 202, 212 (1890).



*Williams v. Suffolk Insurance Co.*, where the Court rhetorically asked whether there could be “any doubt, that when the executive branch of the government, which is charged with our foreign relations . . . assumes a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department.”<sup>36</sup> Although it did not explicitly refer to the Constitution, the Court’s reasoning channeled the document and the importance of separation of powers.<sup>37</sup> The Court reasoned that if it held otherwise, cases would arise that would result in “irreconcilable difference[s] between the executive and judicial departments.”<sup>38</sup>

However, not all foreign relations cases have been held to be political questions. For example, in *Zivotofsky v. Clinton*, the Court held that there was no political question in a case involving a statute permitting Americans to list “Israel” as their place of birth on their passports.<sup>39</sup> Similarly, in *Japan Whaling Ass’n v. American Cetacean Society*, the Court held that there was no political question in a case challenging the Secretary of Commerce’s decision not to certify Japan for harvesting whales in excess of International Whaling Commission quotas.<sup>40</sup> In light of these cases, the Court has not been clear on exactly when a foreign relations issue is political and when it is not.

#### B. Modern Formulation

In part because of the haphazard manner in which issues had been declared political in the past, the Court attempted to formally define the scope of the political question doctrine in *Baker v. Carr*.<sup>41</sup> The Court prefaced its analysis by noting that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”<sup>42</sup> Instead, courts are to analyze six factors to determine the existence of a political question<sup>43</sup>:

1. Whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. Whether there is a lack of judicially discoverable and manageable standards for resolving the issue;
3. Whether it is impossible to decide the issue without an initial policy determination of a kind clearly for nonjudicial discretion;
4. Whether it is impossible for a court to undertake independent resolution of the issue without expressing lack of the respect due coordinate branches of government;

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36. 38 U.S. 415, 420 (1839).

37. *Id.* (“It is enough to know, that in the exercise of [the President’s] constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.”).

38. *Id.*

39. 132 S. Ct. 1421, 1424–425 (2012).

40. 478 U.S. 221, 230 (1986).

41. 369 U.S. 186, 209 (1962).

42. *Id.*

43. *Id.* at 217.

5. Whether there is an unusual need for unquestioning adherence to a political decision already made; or
6. Whether there is a potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these factors is “inextricable from the case at bar,” there should be no dismissal for nonjusticiability on the ground of a political question.<sup>44</sup>

After *Baker*, courts analyzing whether an issue is political have referred to at least one of these six factors in reaching their decisions.<sup>45</sup>

### C. *The Supreme Court's Political Questions Post-Baker*

Since *Baker*, the Supreme Court has held that a question is political in only two cases. In *Nixon v. United States*, a former federal judge asserted that the Senate had not properly “tried” his impeachment proceedings.<sup>46</sup> Specifically, the judge claimed that the word “try” in Article I, Section 3, Clause 6 of the Constitution<sup>47</sup> precluded the Senate from delegating to a select committee the task of hearing the testimony of witnesses.<sup>48</sup> The Court disagreed that “try” imposed any restriction on the Senate, noting that the specific requirements imposed on the impeachment process by the Constitution<sup>49</sup> suggested that the Framers did not intend to impose additional requirements by implication.<sup>50</sup>

Rather, the question was political because it was textually committed to the Senate.<sup>51</sup> The Court focused on the word “sole” in Article I, Section 3, Clause 6 of the Constitution, which states that “[t]he Senate shall have the sole Power to try all Impeachments.”<sup>52</sup> It reasoned that the Senate would not have “sole” authority over impeachments if courts could review its actions to determine whether it properly “tried” an impeached official.<sup>53</sup> In addition, the Court noted the lack of judicially manageable standards for defining the word “try,”<sup>54</sup> the need for finality in any impeachment decision,<sup>55</sup> and the difficulty of fashioning adequate relief.<sup>56</sup>

44. *Id.*

45. *E.g.*, *Nixon*, 506 U.S. at 228–29 (1993); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Powell v. McCormack*, 395 U.S. 486, 548–49 (1969); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010); *767 Third Ave. Assocs.*, 218 F.3d at 160.

46. 506 U.S. at 228.

47. “The Senate shall have the sole Power to try all Impeachments.” U.S. Const. art. I, § 3, cl. 6.

48. *Nixon*, 506 U.S. at 229.

49. “The Members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried.” *Id.* at 230.

50. *Id.*

51. *Id.* at 228–33.

52. *Id.* at 229.

53. *Id.* at 231.

54. *Id.* at 229–30. The difficulty of defining “try” was part of the reason why the issue was one textually committed to the Senate. *Id.*

55. *Id.* at 236.

56. *Id.*

In *Vieth v. Jubelirer*, the Court declared that political gerrymandering cases were nonjusticiable political questions because of a lack of judicially manageable standards, but only four justices joined the plurality opinion stating that such cases were always political.<sup>57</sup> Justice Kennedy, providing the fifth vote, refused to agree that political gerrymandering cases were always nonjusticiable, stating that the lack of judicially manageable standards in the present did not foreclose the possibility of developing or discovering such standards in the future.<sup>58</sup>

In no Supreme Court case has one of the other four factors, or even a combination of the other four factors, been found sufficient to make a question political without the presence of the first two factors.

## II. WHY IT MATTERS WHETHER THE DOCTRINE IS JURISDICTIONAL OR PRUDENTIAL

As mentioned in the Introduction, if the political question doctrine is jurisdictional, courts are obligated to address the issue before reaching the merits.<sup>59</sup> Even if neither party raises the issue, courts can raise it *sua sponte* and, on motions to dismiss, look beyond the facts in the pleadings to decide the case.<sup>60</sup> This is because jurisdictional issues are considered under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, whereas other issues are typically considered under Rule 12(b)(6) for failure to state a claim.<sup>61</sup> Under Rule 12(b)(6), the analysis for dismissal is generally confined to a review of the complaint and its attachments.<sup>62</sup> But under Rule 12(b)(1), the court may consider facts beyond the complaint.<sup>63</sup> In addition, jurisdictional issues cannot be forfeited or waived, so at any moment in the litigation a party can raise the political question doctrine and the case can be decided on it.<sup>64</sup>

These consequences are not mere hypotheticals. In *Corrie v. Caterpillar, Inc.*, the Ninth Circuit dismissed a lawsuit against Caterpillar, a United States corporation, after first finding the political question doctrine a jurisdictional bar<sup>65</sup> and then

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57. 541 U.S. 267, 306 (2004).

58. *Id.* at 313.

59. *Steel Co.*, 523 U.S. at 94 (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)) (“[T]he first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.”).

60. *Corrie*, 503 F.3d at 979 (“Only if the doctrine is jurisdictional may we look beyond the facts alleged in the complaint to decide whether this case presents a political question.”).

61. *See Lane*, 529 F.3d at 557.

62. *Id.*

63. *Id.*

64. *Steel Co.*, 523 U.S. at 93 (stating that jurisdictional arguments “would have to be considered by this Court even though not raised earlier in the litigation—indeed, this Court would have to raise them *sua sponte*”).

65. 503 F.3d at 981–82 (“[T]he political question doctrine . . . . is at a bottom a jurisdictional limitation imposed on the courts . . . . We hold that if a case presents a political question, we lack subject matter jurisdiction to decide that question.”).

finding the issues presented by the plaintiffs to be political.<sup>66</sup> The plaintiffs were individuals whose family members were killed or injured by the Israeli Defense Forces (“IDF”) as the IDF was demolishing homes in the Palestinian Territories using bulldozers manufactured by Caterpillar.<sup>67</sup> The IDF ordered the bulldozers directly from Caterpillar, but the United States government paid for them.<sup>68</sup> The plaintiffs sought compensatory and punitive damages, an injunction directing Caterpillar to cease providing equipment to the IDF, and other relief under several claims.<sup>69</sup> Because the Ninth Circuit considered the foreign relations issues inextricable from the plaintiffs’ claims, it held that the case presented a political question and affirmed the district court’s dismissal of the case.<sup>70</sup> The Ninth Circuit was only able to reach this decision because a court can look beyond the face of the complaint when considering a motion to dismiss on jurisdictional issues.<sup>71</sup> Had the Ninth Circuit declared the political question doctrine to be prudential, it would not have been able to look beyond the face of the complaint and the court may not have concluded the way it did.

The consequences of declaring the political question doctrine jurisdictional are particularly high for future litigants and the development of the law as well. The other justiciability doctrines address the parties to the case or the factual context of the proceedings. Standing ensures that the proper plaintiff is before the court.<sup>72</sup> Mootness ensures that the court is resolving an actual case or controversy.<sup>73</sup> Ripeness ensures that the court is adjudicating a case at the proper point in time.<sup>74</sup> Each of these doctrines leaves open the possibility of later adjudication of the case once the proper plaintiff is found or the facts of the case are properly developed. The political question doctrine addresses the issue of the case itself.<sup>75</sup> Once a question is deemed political, the court will never hear the case.<sup>76</sup>

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66. *Id.* at 983 (“[W]e hold that plaintiffs’ claims are nonjusticiable under the first *Baker* test.”).

67. *Id.* at 977.

68. *Id.* at 978.

69. *Id.* at 979.

70. *Id.* at 983–84.

71. *Id.* at 982 (“We may therefore look beyond the face of the complaint to determine whether the district court properly dismissed plaintiffs’ action under the political question doctrine.”).

72. *See Warth*, 422 U.S. at 498 (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”); *see also* Roberts, *supra* note 7, at 585 (describing standing doctrine as communicating “not you?”).

73. *See Rice*, 404 U.S. at 246; *see also* Roberts, *supra* note 7, at 585 (“[M]ootness represents the notion of ‘too late.’”).

74. *See Blanchette*, 419 U.S. at 140 (describing ripeness as “a question of timing”); *see also* Roberts, *supra* note 7, at 584–485 (“[R]ipeness represents the notion of ‘not yet.’”).

75. *See, e.g., Zivotofsky*, 132 S. Ct. at 1424–425 (holding that whether a statute allowing Americans to list “Israel” as their place of birth on their passports must be given effect does not present a political question); *Nixon*, 506 U.S. at 226 (concluding that whether the Senate properly impeached a federal judge is a political question); *Baker*, 369 U.S. at 209 (holding that a challenge to legislative apportionment presents no political question).

76. *Marbury*, 5 U.S. (1 Cranch) at 170 (“Questions, in their nature political . . . can never be made in this court.”); *see also* Roberts, *supra* note 7, at 585 (“The political question doctrine, however, *if* deemed applicable by the Court, means the Court will never hear the case.”).

## III. SOURCE OF THE POLITICAL QUESTION DOCTRINE

A. *The Difference Between the Political Question Doctrine and Other Justiciability Doctrines*

As discussed above, federal courts often consider other justiciability doctrines—such as standing, mootness, and ripeness—when considering a case. These doctrines trace their origins to Article III of the Constitution and its case-or-controversy requirement.<sup>77</sup> Although the political question doctrine has sometimes been associated with Article III,<sup>78</sup> the doctrine's history and development is distinct from Article III and the justiciability doctrines that spring forth from it.

The early, pre-*Baker* cases that held one issue or another to be political never cited Article III or the case-or-controversy requirement as their reason. Rather, those cases typically referred to the separation of powers and the Constitution's allocation of certain powers and responsibilities to either the legislative or executive branches of government.<sup>79</sup> Cases that did not cite to separation of powers or the Constitution usually cited to other cases that ultimately traced their reasoning back to those sources.<sup>80</sup> In at least one instance, the Court also called issues political by referring to notions of custom and legal tradition predating the establishment of the United States.<sup>81</sup> However, even that justification implicitly relied on the idea that the issue was committed to another branch of government—the legislative or the executive—and not the judicial.<sup>82</sup>

Another key difference between the political question doctrine and the other justiciability doctrines, such as standing, mootness, and ripeness, is that the latter doctrines seek to ensure that a federal court does not issue advisory opinions.<sup>83</sup> Deciding an issue when the plaintiff does not have standing or when the

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77. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”); *Ria*, 404 U.S. at 246 (quoting *Liner v. Jafco Inc.*, 375 U.S. 301, 306 n.3 (1964) (explaining that mootness originates from “the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy”); see also *Blanchette*, 419 U.S. at 138 (noting that ripeness involves, “in part, the existence of a live ‘Case or Controversy’”).

78. See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Zivotofsky*, 132 S. Ct. at 1431 (Sotomayor, J., concurring).

79. E.g., *Doe*, 57 U.S. (16 How.) at 657; *Luther*, 48 U.S. (7 How.) at 42; *Williams*, 38 U.S. at 420.

80. E.g., *Bryant*, 281 U.S. at 79–80; *Mountain Timber Co.*, 243 U.S. at 234; *Terlinden*, 184 U.S. at 288–89.

81. *Jones*, 137 U.S. at 212–16.

82. *Id.* at 212 (noting that the determination of sovereignty is a “political question” that is determined by the “legislative and executive departments” and that this principle has “always been upheld by this court” and “is equally well settled in England”).

83. See *Lujan*, 504 U.S. at 598 n.4 (“The purpose of the standing doctrine is to ensure that courts do not render advisory opinions . . .”); *St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (“A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.”); cf. *Fortson v. Toombs*, 379 U.S. 621, 631–32 (1965) (Goldberg, J., dissenting) (explaining that ripeness, like mootness, serves to prevent a federal court from issuing advisory opinions).

controversy is moot results in an opinion that has no tangible effect.<sup>84</sup> However, the political question doctrine does not share that same quality. Many of the cases where the Court declared a question political were cases where an actual decision on the merits would have had a tangible effect on the litigating parties.<sup>85</sup> There was nothing “advisory” about a potential opinion.

### *B. The Political Question Doctrine’s Source*

Rather, the political question doctrine arises from the structure of our federal government and the Constitution’s division of powers and responsibilities between the three branches of government.<sup>86</sup> Its purpose is to ensure that courts do not usurp the powers of the legislative or executive branches.<sup>87</sup> More generally, it is a recognition of the limitations of courts in answering every question that might be brought before them.<sup>88</sup> Where courts held questions to be political, they determined that the issues were either committed to or better addressed by the executive or legislative branches.<sup>89</sup> Where courts did not hold a question to be political, they determined that the issues were either committed to or properly addressed by the judicial branch.<sup>90</sup> Without separation of powers—if the government were simply a single entity exercising all three powers—it would make little sense to ask whether a question was properly before a court. At its core, the doctrine seeks to answer the question, “Which branch is the right branch to resolve this issue?”

Each of the six factors either directly or indirectly seeks to answer this question.

#### *1. How Factor One Preserves Separation of Powers*

The first factor explicitly looks for a “textually demonstrable constitutional commitment of the issue” to a particular branch.<sup>91</sup> This is the most straightforward of the factors. Courts are asked to look at the text of the Constitution and determine whether the document places resolution of the issue with either the legislative or executive branch rather than the judicial branch.<sup>92</sup> The first factor therefore directly

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84. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (noting that without standing, a federal court’s “exercise of its power . . . would be gratuitous”); *St. Pierre*, 319 U.S. at 42 (deciding moot questions would not affect the rights of the litigants before the court).

85. E.g., *Nixon*, 506 U.S. 224 (whether Senate properly “tried” an impeachment); *Luther*, 48 U.S. (7 How.) 1 (whether the defendant trespassed); *Doe*, 57 U.S. (16 How.) 635 (whether the plaintiff could eject the defendant from certain lands).

86. See *Baker*, 369 U.S. at 210 (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

87. See *id.* at 210–011.

88. See *id.*

89. *Nixon*, 506 U.S. 224; *Vieth*, 541 U.S. 267.

90. E.g., *Zivotofsky*, 132 S. Ct. 1421; *Japan Whaling Ass’n*, 478 U.S. 221.

91. *Baker*, 369 U.S. at 217.

92. *Id.*; *Nixon*, 506 U.S. at 228. Of course, the problem is that the text of the Constitution is silent about judicial review. So, by definition, it is also silent about precluding judicial review in specific

asks courts to consider the separation of powers and whether the question before the court is one that courts are properly empowered to answer. Although there may be different policy reasons behind a constitutional commitment of an issue to a particular political branch, the first factor does not ask courts to delve into such considerations nor does it require the commitment be justified in any way. The Framers may have desired one issue to be committed to a particular branch for one reason and preferred that another issue be committed to another branch for a completely different reason. Concerns of judicial competence or potential for embarrassment may have motivated these decisions, but the Supreme Court has never held that a court needs to determine the reason for a textual commitment. If these reasons were important, the Court in *Baker* could have articulated factor one to reflect this. It did not. Moreover, it has indicated that factor one standing alone is sufficient to find a political question.<sup>93</sup> Therefore, the only common thread that ties different textual commitments together is the principle of separation of powers.

## 2. How Factor Two Preserves Separation of Powers

The second factor examines whether there are “judicially discoverable and manageable standards” for resolving the issue.<sup>94</sup> This factor makes the most sense when placed in the context of separation of powers: the lack of judicially discoverable and manageable standards is a means by which a court might infer that the issue is beyond its jurisdiction and that it is more appropriately addressed by another branch.<sup>95</sup> This is because federal courts have an obligation to decide cases properly before them.<sup>96</sup> They are not supposed to decline to hear cases merely because the questions are exceedingly difficult or complicated.<sup>97</sup> If the lack of judicially discoverable and manageable standards were only meant to gauge a court’s ability to resolve an issue, it could be in direct tension with the court’s duty to decide a case.

It is true that the second factor could be understood as simply asking whether a court has the means to decide an issue. After all, the factor does not ask whether another branch would have its own discoverable or manageable standards to decide the issue; it only asks whether such standards exist with respect to the judicial branch. However, the political question doctrine has not been described as simply an issue that a court is incompetent to decide: its description includes the notion that the question is more properly presented to the political branches of

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areas. But this does not change the fact that the first *Baker* factor asks courts to search for such a commitment in the Constitution’s text.

93. *Baker*, 369 U.S. at 217.

94. *Id.*

95. See *Nixon*, 506 U.S. at 228–29 (“[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”).

96. See *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

97. See *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring).

government.<sup>98</sup> In light of that description, it makes more sense to understand the lack of judicially discoverable or manageable standards as implying that the political branches are better suited to deciding the issue.

### 3. *How Factor Three Preserves Separation of Powers*

The third factor asks whether, in order to answer the question at issue, an initial policy determination needs to be made that is clearly for nonjudicial discretion.<sup>99</sup> This factor directly asks whether there is a preliminary policy decision that has to be made by another branch of government in order to decide the case. Examples of where such a policy decision may be necessary are where Congress has not yet passed legislation on an issue, where an agency has not yet promulgated any regulations on a topic,<sup>100</sup> or where a treaty has not yet been ratified between countries. A court may not be comfortable adjudicating a case in such a situation because it may be concerned with legislating from the bench. But once there is a relevant statute, regulation, or treaty on point, then the court may be able to exercise its judicial powers to decide the issue.

For example, the Supreme Court has been reluctant to decide issues arising in the context of foreign relations, but it has been more willing and more assertive in doing so if interpretation of a statute or a treaty is involved.<sup>101</sup> In *Medellin v. Texas*, the Supreme Court held that an International Court of Justice decision was not binding on domestic courts based on the language of the U.N. Charter, Vienna Convention on Consular Relations, and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention.<sup>102</sup> The Court's decision stands out because it was directly contrary to the position of the Executive,<sup>103</sup> a branch that typically is granted great discretion in foreign affairs.<sup>104</sup>

The Court's willingness to enter this arena when a statute or treaty is involved makes sense. It may not be the province of the Court to decide whether an American can name "Israel" as his place of birth on his passport<sup>105</sup> or whether to sanction a foreign country for violating international whaling quotas,<sup>106</sup> but once

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98. See *Marbury*, 5 U.S. (1 Cranch) at 170.

99. *Baker*, 369 U.S. at 217.

100. Such a situation may also be dismissed on the basis of ripeness. However, where Congress or an agency has not spoken on an issue, there may be an open policy question that a federal court may not have discretion to answer. In fact, the lack of regulation itself may be a policy decision by an agency. See *Massachusetts v. EPA*, 549 U.S. 497, 532–34 (2007) (holding that EPA may refuse to promulgate regulations as long as it provides a "reasoned explanation").

101. Compare *Terlinden*, 184 U.S. 270 and *Doe*, 57 U.S. 635 with *Zivotofsky*, 132 S. Ct. 1421; *Japan Whaling Ass'n*, 478 U.S. 221; and *Medellin v. Texas*, 552 U.S. 491 (2008).

102. *Medellin*, 552 U.S. at 506–611.

103. *Id.* at 503.

104. See, e.g., *id.* at 523–24 (conceding that the President's constitutional role "uniquely qualifies" him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (noting the President's "vast share of responsibility for the conduct of our foreign relations" and his "independent authority to act").

105. *Zivotofsky*, 132 S. Ct. at 1424.

106. *Japan Whaling Ass'n*, 478 U.S. at 223.



there is a statute or treaty on those issues, the Court is certainly empowered to decide whether or not the statute or treaty is constitutional or to interpret its language.<sup>107</sup> The initial policy determination having been made, the Court is now able to bring its tools of interpretation to bear on the subject.

#### 4. *How Factor Four Preserves Separation of Powers*

The fourth factor questions whether judicial action would be impossible without expressing “a lack of the respect due” a coordinate branch of government.<sup>108</sup> There would be a lack of respect to another branch of government only if the judiciary were operating beyond its bounds and encroaching upon the powers of another branch. If a court were simply acting beyond its Article III limitations—for example, if a federal court were to decide a case involving only state issues and no diversity—it would not necessarily be disrespecting the legislative or executive branches. Neither Congress nor the Executive has the power to interpret the law; that is, to “say what the law is.”<sup>109</sup> Therefore, a federal court deciding such a case would not be infringing on any powers assigned to those branches. The disrespected body in this example would be the States, and more specifically, the State judiciaries. And the political question doctrine has been understood to refer to those issues that the political branches of government must decide, not the judiciary.<sup>110</sup> In this example, the issue is not necessarily beyond the province of courts to decide; rather, the wrong courts are deciding them. Therefore, factor four makes the most sense when “lack of the respect due” refers specifically to the encroachment of the judiciary on the powers of the legislative or executive branches.

#### 5. *How Factor Five Preserves Separation of Powers*

The fifth factor asks whether there is an unusual need for “unquestioning adherence to a political decision already made” by another branch of government.<sup>111</sup> The suggestion is that in such a situation the judiciary should not interfere with the exercise of another branch’s powers. This factor only makes sense when understood as applying to the judicial branch vis-à-vis the other two branches. As far as the judicial branch itself is concerned, there is already an established hierarchy between the courts: the district courts adhere to the holdings of their respective circuit courts of appeals, and all courts adhere to the holdings of the Supreme Court on federal and constitutional law. More importantly, the political branches are the ones empowered to make “political” decisions.<sup>112</sup> Since the judicial branch is prohibited

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107. See, e.g., *id.*; *Zivotofsky*, 132 S. Ct. at 1424.

108. *Baker*, 369 U.S. at 217.

109. *Marbury*, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and of the judicial department to say what the law is.”).

110. See *id.* at 170.

111. *Baker*, 369 U.S. at 217.

112. See *id.*

from making such decisions,<sup>113</sup> at least theoretically there should be no situation calling a court to unquestioningly adhere to a political decision made by another court.

Admittedly, court opinions are often motivated by political considerations and can be perceived as political decisions.<sup>114</sup> However, even these opinions are couched in legal reasoning, and courts are limited by the constraints imposed by textual language and precedent.<sup>115</sup> Even *Bush v. Gore*—considered a political decision by many people—was written as a legal opinion on an Equal Protection claim.<sup>116</sup> Given the fact that even the most “political” court opinions are written with at least a veneer of legal analysis, there is a practical difficulty in determining which opinions are “political decisions” and which are “legal decisions.”

Instead, the factor calling for “unquestioning adherence to a political decision already made” operates less problematically when it is considered specifically with regard to the legislative and executive branches. The business of the courts often involves interpreting and declaring the constitutionality of congressional or executive action. On some level, all congressional or executive actions are “political” decisions, and in exercising their powers, courts are often actively contesting these decisions and causing tension with the idea of separation of powers. In light of the ever-present danger of overreach and encroachment on the powers of the other branches, this factor ensures that courts take pause before plunging forward with a judicial decision.

#### 6. How Factor Six Preserves Separation of Powers

The final factor asks whether judicial action would create a “potentiality of embarrassment from multifarious pronouncements by various departments on one

113. *See id.*

114. *E.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); *see also* Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); Ledyard King, *Regular People, Weighty Decision Put High Court in New Light*, GANNETT NEWS SERVICE, Dec. 14, 2000 (quoting Michael Gerhardt as stating that “the court has transformed itself into a political institution” after *Bush v. Gore*); Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18 (arguing that the Court after *Bush v. Gore* has “made it impossible for citizens of the United States to sustain any kind of faith in the rule of law”); David G. Savage & Henry Weinstein, *Supreme Court Ruling: Right or Wrong*, L.A. TIMES, Dec. 21, 2000, at A24 (quoting Akhil Reed Amar as stating that “[m]any of us thought that courts do not act in an openly political fashion. So [*Bush v. Gore*] comes as a startling event that has shaken constitutional faith.”).

115. *See Cobens*, 19 U.S. at 372–73 (“The words of the constitution are sufficiently express . . . that these Courts may be thus controlled . . .”); *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (“We give the words of a statute their ‘ordinary, contemporary, common meaning,’ absent an indication Congress intended them to bear some different import.”) (quoting *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997)) (internal quotation marks omitted); *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“While stare decisis is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.”) (citations omitted) (internal quotation marks omitted).

116. *Bush*, 531 U.S. at 103 (“With respect to the equal protection question, we find a violation of the Equal Protection Clause.”).

question.”<sup>117</sup> As with the previous factors, this factor makes the most sense if it is concerned with the interaction of judicial decisions with the actions of the other two branches. “Potentiality of embarrassment” arises when there are conflicting pronouncements from two or all branches of government on an issue where it is not clear which branch has the ultimate authority. “Multifarious” pronouncements from various departments within the judicial branch do not present the same problem because when different courts or departments of the judicial branch pronounce conflicting opinions, the hierarchy of the judicial system makes clear whose pronouncements are controlling. Such clarity does not necessarily exist when two or three separate branches of government speak simultaneously on the same issue. In such a situation there is a real risk that a court may be operating outside of its constitutional bounds. As with factor five, this factor ensures that courts carefully consider the cases before them when making a judicial decision.

Although a “potentiality of embarrassment” may exist when a court properly exercises its Article III powers, this cannot be what the Supreme Court had in mind with this factor. Given that courts are generally obligated to exercise jurisdiction where they have it,<sup>118</sup> the mere potentiality of embarrassment cannot be enough to stay a court’s hand. In its history, the Court has decided cases that have brought it into conflict with the other branches of government in ways that could be considered as having created a “potentiality for embarrassment.”<sup>119</sup> Nevertheless, the opinions that came out of those cases have been considered perfectly valid judicial decisions and no political question was found. Therefore, the “potentiality for embarrassment” cannot simply be from a judicial opinion that conflicts with a pronouncement of the legislative or executive branch. There must also be the added requirement that the ultimate authority on the matter is unclear—that a court is not only in conflict with another branch, but that it may have no business opining on the issue at all.

#### IV. WHY THE DOCTRINE IS BOTH JURISDICTIONAL AND PRUDENTIAL

An analysis of the six *Baker* factors indicates that the best answer to the question of whether the political question doctrine is jurisdictional or prudential is that the first factor is jurisdictional and the other five factors are prudential. Such an answer is not unusual. Other justiciability doctrines also contain mixed jurisdictional and prudential elements. For example, standing has jurisdictional

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117. *Baker*, 369 U.S. at 217.

118. *See Cobens*, 19 U.S. at 404.

119. *E.g.*, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act); *United States v. Butler*, 297 U.S. 1 (1936) (voiding the Agricultural Adjustment Act of 1933); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (voiding legislation regulating the coal industry); *Morehead v. New York*, 298 U.S. 587 (1936) (voiding a New York minimum wage law for women and children). These decisions ultimately led to the proposal of the Judicial Procedures Reform Bill of 1937, which was President Franklin Delano Roosevelt’s effort to add additional Justices to the Supreme Court. *See* Michael E. Parrish, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 24 (2002).

elements (injury-in-fact, traceability, and redressability) as well as prudential elements (zone-of-interest and third-party standing).<sup>120</sup> Ripeness is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.”<sup>121</sup> Therefore, making a similar division within the political question doctrine would not be at all novel or contrary to how the Court has treated other justiciability doctrines.

### A. The Jurisdictional Component

The first *Baker* factor is jurisdictional. It asks whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>122</sup> Of all the *Baker* factors, this is the only one that explicitly grounds itself in the Constitution.<sup>123</sup> As the Constitution is the supreme law of the land, no court, including the Supreme Court, is free to flout its provisions.<sup>124</sup> If the first factor were prudential, then a court could exercise discretion in invoking it in cases where the first factor is at issue. This would make no sense. It would essentially mean that the judicial branch could consider an issue textually committed to the executive or legislative branch by the Constitution—a violation of separation of powers.

Of course, the Constitution’s text is not always explicit on which matters are committed to which branches.<sup>125</sup> Therefore, some degree of textual interpretation is required for courts to decide whether the first factor has been implicated.<sup>126</sup> However, this does not mean that courts are free to arbitrarily decide which issues are assigned to which branches.<sup>127</sup> They are still confined to the text of the Constitution in conducting their analyses.

While this may be an unsatisfying answer, the Article III justiciability doctrines exhibit similar problems. The elements of constitutional standing—injury-in-fact, traceability, and redressability—cannot be found in the text of Article III or anywhere else in the Constitution. Rather, these elements have been developed by the Supreme Court over a series of opinions; they give effect to the requirement

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120. *Allen*, 468 U.S. at 751.

121. *National Park Hospitality Ass’n v. Dept. of Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993)).

122. *Baker*, 369 U.S. at 217.

123. *Id.*

124. *Marbury*, 5 U.S. (1 Cranch) at 180 (“Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”).

125. *Nixon*, 506 U.S. at 240 (White, J., concurring) (“Although *Baker* directs the Court to search for a ‘textually demonstrable constitutional commitment’ of such responsibility, there are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment.”).

126. *Id.* (“The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution.”).

127. *Vieth*, 541 U.S. at 278 (“‘The judicial Power’ created by Article III, § 1, of the Constitution is not *whatever* judges choose to do . . .”).

that Article III courts adjudicate actual “Cases” or “Controversies” and prevent them from issuing advisory opinions.<sup>128</sup> That many more cases turn on the issue of standing has led to a much more detailed and nuanced development of the standing doctrine, but there is no reason why the political question doctrine would not be amenable to similar development through case law. Moreover, the courts have used traditional tools of textual and historical interpretation to determine whether certain issues have been textually committed to a particular branch of government.<sup>129</sup>

There may be occasions where the traditional tools do not work. The Court has sometimes stated that the issue of whether a matter is textually committed to another branch of government is intertwined with the issue of whether judicially manageable standards exist for its resolution.<sup>130</sup> However, this should not be taken to mean that factors one and two are the same or that factor two is also jurisdictional. It may be the case that an issue is textually committed to another branch of government, even though judicially manageable standards exist.<sup>131</sup> Nonetheless, a federal court would not have jurisdiction over the matter. Conversely, a case may be textually committed to the judiciary (or the Constitution may be silent or neutral on the issue), but judicially manageable standards may prove elusive.<sup>132</sup> In that case, a court may have jurisdiction, but for prudential reasons the wiser course of action may be to abstain from judgment.<sup>133</sup>

In a situation where the traditional tools of interpretation fail to serve a federal court in its interpretation of the Constitution’s text, and there is no other tool to serve in their stead, it would be better to say that the Constitution is either silent or neutral on the issue. It is unlikely that the Framers would have made the commitment of a particular issue so difficult to discern that a court is unable to determine the Constitution’s command one way or the other.<sup>134</sup>

### B. The Prudential Components

The other five *Baker* factors are prudential. There is an argument that these other factors also serve to preserve the explicit separation of powers articulated in the Constitution. However, this would make the five factors duplicative of the first factor, which explicitly asks whether an issue has been committed by the

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128. See *Steel Co.*, 523 U.S. at 102–04; *Lujan*, 504 U.S. at 559–62; *Whitmore v. Arkansas*, 495 U.S. 149, 154–456 (1990); *Allen*, 468 U.S. at 750–052; *Warth*, 422 U.S. at 498–501.

129. See *Nixon*, 506 U.S. at 229–231, 233–36 (analyzing the use and definition of the word “sole” and the history behind the drafting of impeachment provisions in the Constitution); *Powell*, 395 U.S. at 521–47 (going into extensive detail of the history behind qualifications for House membership).

130. See *Nixon*, 506 U.S. at 228.

131. *Id.* at 245–51 (White, J., concurring) (explaining why the definition of the word “try” is “hardly so elusive as the majority would have it”).

132. See, e.g., *Vieth*, 451 U.S. at 312 (Kennedy, J., concurring).

133. See *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring).

134. See *South Carolina v. United States*, 199 U.S. 437, 449 (1905) (“It must also be remembered that the framers of the Constitution were . . . practical men . . . putting into form the government they were creating, and prescribing, in language clear and intelligible, the powers that government was to take.”).

Constitution to the legislative or executive branches of government. Given the careful consideration that goes into the drafting of Supreme Court opinions and the development of tests that will be used by courts throughout the country, it makes more sense for the five factors to address separation of powers considerations beyond those explicitly stated within the Constitution.<sup>135</sup>

These considerations include questions of judicial competence to address an issue before the court and concerns regarding the prudent exercise of judicial review.<sup>136</sup> The second and third factors ask whether the case before the court calls for decision-making beyond the court's competence.<sup>137</sup> If a court is incompetent to decide an issue, then perhaps the issue is better committed to one of the other branches. The fourth, fifth, and sixth factors ask whether judicial action would result in disrespect of or embarrassment to the other branches of government or to the government as a whole.<sup>138</sup> Such a result may imply that the court is encroaching on an area that is committed to another branch.

1. *Prudential Factors Two and Three: Decision-Making Beyond a Court's Competence*

The second and third *Baker* factors are:<sup>139</sup>

2. Whether there is a lack of judicially discoverable and manageable standards for resolving the issue.
3. Whether it is impossible to decide the issue without an initial policy determination of a kind clearly for nonjudicial discretion.

Justice Sotomayor expressed in a concurring opinion that these factors address the competence of courts to decide an issue.<sup>140</sup> The judicial power created by Article III of the Constitution is not "whatever judges choose to do but rather the power to act in the manner traditional for English and American courts."<sup>141</sup> Justice Sotomayor took this to mean "the application of some manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts of a concrete case."<sup>142</sup> If a court has no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a policy determination charged to a political branch, the suit is beyond Article III review.<sup>143</sup> This is not to say that courts are incapable of interpreting or applying somewhat ambiguous standards using

135. It is also unlikely that the Supreme Court would intend to create redundant factors when even Supreme Court dicta can carry great weight in lower courts' analyses. *See* *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (quoting *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 861 n.3 (1st Cir. 1993)) ("Carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.").

136. *See Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring).

137. *See id.*

138. *See id.*

139. *Baker*, 369 U.S. at 217.

140. *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring).

141. *Vieth*, 541 U.S. at 278.

142. *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring).

143. *Id.*

traditional tools of statutory or constitutional interpretation.<sup>144</sup> But where such tools are completely useless in helping a court decide an issue and no other tool can be ascertained, the best decision from the court may be to abstain from judgment.<sup>145</sup>

In contrast with factor one, prudential considerations motivate factors two and three. On its face, the lack of judicially manageable standards does not address whether a court has proper jurisdiction over an issue, but whether a court has the competence to decide an issue. It is a consideration that is completely separate from whether an issue is properly before the court. The impossibility of making a decision without making a preliminary policy choice also addresses whether the court is capable of making a decision, not whether an issue is properly within the court's jurisdiction. One might imagine that once the proper branch of government makes a policy decision, the court may then proceed to decide the dispute if it still exists. This latter consideration has much in common with the doctrine of prudential ripeness, where a court determines that the timing of a dispute counsels against hearing the case.<sup>146</sup>

While these two factors seek to preserve separation of powers, they cannot originate from the Constitution unless they are to be redundant in light of the first factor. If there is a constitutional prohibition against judicial review, it would be identified by a court applying the first factor. Instead, these two factors help identify a political question when the Constitution is silent or neutral on the issue.

The cases where the second and third factors alone identify a political question should be few. Courts have a duty to resolve a controversy within their traditional competence and proper jurisdiction and cannot refuse simply because the question is difficult.<sup>147</sup> Indeed, courts have consistently managed to craft tests or other modes of analysis to decide difficult and novel questions brought before it.<sup>148</sup> That these tests may have flaws or ambiguities in their application are not sufficient reasons to declare that no judicially discoverable or manageable standard exists. Many of the tests that are currently used by federal courts suffer from imperfections in their construction or their application.<sup>149</sup> This does not rob such tests of

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144. *Id.*

145. *Id.*

146. *See* Roberts, *supra* note 7, at 584–485 (“[R]ipeness represents the notion of ‘not yet.’”).

147. *Cobens*, 19 U.S. at 404.

148. *E.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984) (establishing level of deference to agency constructions of statutes); *Lassiter v. Dept. of Soc. Servs. of Durham Cty.*, 452 U.S. 18 (1981) (establishing a balancing test for determining “fundamental fairness” under the Due Process Clause); *see also* *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (recognizing that intermediate scrutiny applies to Equal Protection Clause claims alleging discrimination on the basis of sex or illegitimacy).

149. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989) (criticizing the Batson framework for eliminating race-based peremptory strikes); Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard That Works*, 82 N.Y.U.L. REV. 1174 (2007) (criticizing the Anderson/Burdick test for deciding voting disenfranchisement claims); Laura L. Little, *It's About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933 (1993) (criticizing *City of Los Angeles v. Lyons* and its effect on the doctrine of standing).

legitimacy. Declaring that there are no judicially discoverable or manageable standards to judge the issue or that reaching a decision is impossible without making a preliminary policy choice should occur only when there are essentially no judicial standards by which a court can proceed or where a preliminary policy is demanded by the circumstances.

2. *Prudential Factors Four, Five, and Six: Disrespect and Embarrassment Counseling Against Judicial Review*

The final three *Baker* factors are:<sup>150</sup>

4. Whether it is impossible for a court to undertake independent resolution of the issue without expressing lack of the respect due coordinate branches of government.
5. Whether there is an unusual need for unquestioning adherence to a political decision already made.
6. Whether there is a potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Each of these factors amounts to prudential considerations. Factor four implies that when judicial action does not express the proper amount of respect due the other two branches of government there may be an overstepping of judicial authority. Factor five is similarly concerned with overstepping judicial boundaries and conflicting with a political decision made by another branch of government. Factor six is concerned about courts potentially embarrassing a branch of government or the government as a whole by addressing a question that might need to be answered by another branch of government.

Each of these factors should be construed as an additional means of safeguarding the principle of separation of powers, but they do not make much sense as constitutional limitations. With respect to factor four, it is not clear when a court expresses a “lack of respect” towards another branch of government. Federal courts do not express a “lack of respect” for the other branches of government when they interpret the law or consider the constitutionality of government action.<sup>151</sup> Their constitutionally mandated responsibility is to do exactly that.<sup>152</sup> For a court to find such a “lack of respect,” it must necessarily look beyond the simple exercise of its powers. Where there is a lack of respect, there may be an overstepping of judicial authority.

Regarding factor five, courts are not supposed to make or otherwise involve themselves in political decisions.<sup>153</sup> To the extent that courts are making political

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150. *Baker*, 369 U.S. at 217.

151. *See Powell*, 395 U.S. at 548; *Marbury*, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and of the judicial department to say what the law is.”).

152. *See Powell*, 395 U.S. at 549; *Marbury*, 5 U.S. (1 Cranch) at 177.

153. *See Marbury*, 5 U.S. (1 Cranch) at 170 (“Questions, in their nature political . . . can never be made in this court.”).



decisions or going beyond their constitutionally enumerated powers, factor one already addresses those situations. Therefore, factor five refers to those political decisions made by the other two branches and asks courts to consider whether this is an occasion where there is an unusual need to adhere to those decisions. Where courts rule against those decisions, they may be overstepping their bounds.

Finally, factor six requires courts to pause when confronted with an issue where their jurisdiction is unclear. Typically, ruling on the constitutionality of a statute or otherwise interpreting the law, rather than adding to a cacophony of pronouncements from the other branches of government, acts to resolve any dispute and finally settle the matter in question.<sup>154</sup> Therefore, the mere exercise of Article III powers cannot qualify as one of the “multifarious” pronouncements that factor six refers to. Instead, factor six asks courts to consider whether a judicial opinion would not ultimately resolve a dispute and thereby result in embarrassment from conflicting pronouncements between branches. If it might, again the courts may be overstepping their bounds.

Taken together, the last three factors are considerations a court should take into account to ensure that it exercises its powers in a manner that is sensitive to the principle of separation of powers between the three branches of government.

There should be very few cases where such considerations rise to a level where courts should abstain from deciding an issue. The mere fact that a court is called upon to resolve the constitutionality of an act of another branch of government is not enough.<sup>155</sup> And a court cannot refuse to adjudicate a dispute merely because a decision has “significant” political overtones or affects the country’s foreign relations in general.<sup>156</sup> Courts have a duty to resolve a controversy within their traditional competence and proper jurisdiction<sup>157</sup> and cannot refuse simply because “the question is difficult, the consequences weighty, or [the decision] might conflict with the policy preferences of the political branches.”<sup>158</sup>

Instances where the courts have declined to exercise their powers for the reasons expressed in the last three factors are very few. Historically, they have been limited to cases questioning the good faith with which another branch attests to the

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154. See *Powell*, 395 U.S. at 549; *Marbury*, 5 U.S. (1 Cranch) at 177.

155. See *United States v. Munoz-Flores*, 495 U.S. 385, 390–091 (1990) (“If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.”).

156. *Japan Whaling Ass’n*, 478 U.S. at 230.

157. *Cohens*, 19 U.S. at 404 (“It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.”).

158. *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring); *Cohens*, 19 U.S. at 404.

authenticity of its internal acts.<sup>159</sup> Although the Court has suggested that situations where there is an unusual need for finality to the action of a particular branch,<sup>160</sup> or where there is an acute risk of “embarrassment of our government abroad or grave disturbance at home,” might be sufficient to render a question political,<sup>161</sup> there is no case where the Court has actually held so on those grounds alone.

Moreover, the last three *Baker* factors find common ground with the doctrine of prudential ripeness under which considerations of justiciability or comity lead courts to abstain from deciding questions whose initial resolution is better postponed to a later time.<sup>162</sup> As Justice Sotomayor expressed with respect to the political question doctrine, “it may be appropriate for courts to stay their hand in cases implicating delicate questions concerning the distribution of political authority between coordinate branches until a dispute is ripe, intractable, and incapable of resolution by the political process.”<sup>163</sup>

As its name suggests, prudential ripeness is considered a prudential, not jurisdictional, doctrine.<sup>164</sup> And as with the political question doctrine, the court is not necessarily issuing an advisory opinion when ruling on an issue that might be unripe for review. Rather, considerations of whether a plaintiff has exhausted all administrative remedies<sup>165</sup> or whether the factual record is sufficiently developed determine whether a court will declare an issue ripe.<sup>166</sup> The determination is that the timing of review is not proper.<sup>167</sup> A similar concern animates the last three *Baker* factors.

## V. HOW TO APPLY THE DOCTRINE UNDER THIS FRAMEWORK

Concluding that the first factor of the political question doctrine is jurisdictional and the other five factors are prudential means that issues that have been held political based solely on the prudential *Baker* factors are not forever barred from adjudication. The factual context surrounding a particular case that justifies abstention may not exist in another case addressing the same issue. For

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159. *E.g.*, *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672–73 (1892); *see also* *Sherman v. Story*, 30 Cal. 253, 276 (1866); *Ex parte Wren*, 63 Miss. 512, 526–627 (1886).

160. *Coleman v. Miller*, 307 U.S. 433, 454–455 (1939).

161. *Baker*, 369 U.S. at 226.

162. *See* *Goldwater v. Carter*, 444 U.S. 996, 996 (1979) (Powell, J., concurring); *see also* *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808; *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 892 (1990).

163. *Zivotofsky*, 132 S. Ct. at 1433 (Sotomayor, J., concurring).

164. *Horne v. Dept. of Agric.*, 133 S. Ct. 2053, 2062 (2013) (noting that the Court has recognized that “prudential ripeness” is not jurisdictional).

165. *See* *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967) (stating that one of the “basic rationale[s]” of the ripeness doctrine is “to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties”), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977).

166. *See* *Lujan*, 497 U.S. at 891 (stating that a regulation is not ordinarily “ripe” for judicial review under the APA until “the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out”).

167. *See* *Roberts*, *supra* note 7, at 584–485 (“[R]ipeness represents the notion of ‘not yet.’”).

example, the final three *Baker* factors examine the context in which a judicial decision is being made and not the issue before the court. Asking whether a court is exhibiting a lack of respect due a coordinate branch, is faced with an unusual need for unquestioning adherence to a political decision already made, or is creating a potentiality for embarrassment questions the wisdom of the court exercising its power in a specific context, rather than the power or ability of the court to make a decision on the issue. Therefore, the same issue raised in a completely different context does not necessarily implicate the last three factors. The unusual need for unquestioning adherence to the political decision might no longer exist or the potentiality for embarrassment might no longer be present.

Even a political question based on the second and third *Baker* factors should not result in an issue being forever barred from adjudication. Judicially manageable standards may not exist presently, but could be discovered or developed in the future.<sup>168</sup> And an issue that requires an initial policy determination that is clearly for nonjudicial discretion may in fact return before the court after that policy determination is made. Justice Kennedy's concurrence in *Vieth* suggests that some issues that are considered political now might lose that label later.<sup>169</sup>

The only political questions that are forever withheld from judicial consideration are those that have been textually committed in the Constitution to another branch of government. Barring a constitutional amendment, federal courts have no discretion to decide issues that are constitutionally committed to the executive or legislative branches.<sup>170</sup>

Courts reviewing cases involving questions that have been held political would then have to determine whether the question is political on jurisdictional or prudential grounds. Traditional tools of judicial analysis should be sufficient to make this determination. If an earlier case held that an issue was political based on the first factor, or some combination of the first factor and the other five factors, then it remains political. For example, a question regarding the proper process of impeachment in the Senate would likely remain political if raised again because the Court in *Nixon* held that the issue was textually committed to the Senate.<sup>171</sup> On the other hand, if it had been held political based on some combination of the other five factors, then a court should evaluate whether those factors are still implicated in the case before it. For example, political gerrymandering cases may not necessarily be political if raised in a future case because judicially manageable standards of review may be discovered or developed that overcome the concerns expressed by the Court in *Vieth*.<sup>172</sup> A court would have to evaluate on a case-by-case basis

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168. See *Vieth*, 451 U.S. at 311 (Kennedy, J., concurring) ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

169. See *id.*

170. See *Marbury*, 5 U.S. (1 Cranch) at 180 ("[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument.").

171. *Nixon*, 506 U.S. at 228–33.

172. See *Vieth*, 451 U.S. at 311 (Kennedy, J., concurring).

whether any earlier holding was reached on jurisdictional or prudential grounds, and then rule accordingly.

#### CONCLUSION

The political question doctrine seeks to preserve an important foundational principle of our system of government: the separation of powers. To more clearly define the scope of the doctrine, the Supreme Court laid out six factors for consideration when deciding any political question issue. However, the Court failed to specify whether this doctrine is jurisdictional or prudential. Although cases have been decided without explicitly answering that question, the consequences of an answer are significant and both courts and litigators deserve clarity on the issue. An analysis of the six *Baker* factors shows that only the first factor poses a jurisdictional question, and the remaining five consist of only prudential considerations. Courts should conduct their analyses in accordance with these distinctions, and any prior decisions finding political questions should be evaluated in light of which factors motivated the courts' conclusions in those cases. In this way, the political question doctrine will be better applied when it is invoked by litigants and courts, and the six *Baker* factors will be applied with proper consideration of how each one relates to the goal of preserving the separation of powers in our federal government.