AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Constitutional Authority and Judicial Power

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

In 2005, Congress included in an appropriations bill a provision that stated the American commitment to identifying Jerusalem as the capital of Israel and requiring that passports for U.S. citizens born in Jerusalem identify their nation of birth as Israel. By contrast, the U.S. Department of State had determined that no identifying nation should be linked to Jerusalem because the status of the city was contested by Israel and Jordan. President George W. Bush had announced that the statutory provision could not be regarded as binding because it would otherwise interfere with the president's constitutional authority. Menachem Binyamin Zivotofsky was a U.S. citizen born in Jerusalem, and when his mother applied for a U.S. passport she objected that the State Department did not list Israel as the place of birth. She filed suit against the Secretary of State in federal district court seeking an order directing compliance with the statute. The trial court and circuit court dismissed the case as presenting a nonjusticiable political question. Zivotofsky appealed to the U.S. Supreme Court, which reversed the lower courts in an 8–1 decision that concluded that the constitutionality of the statutory provision was justiciable.

What factors need to be considered to determine whether this dispute is justiciable? If there were no statute in place, would Zivotofsky have a basis for judicial involvement? What are the differences between Breyer's approach to political questions and Roberts'? What distinguishes justiciable conflicts between the executive and the legislature and nonjusticiable ones? What distinguishes foreign policy disputes that are justiciable from those that are nonjusticiable?

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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In general, the Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid." Our precedents have identified a narrow exception to that rule, known as the "political question" doctrine. . . . We have explained that a controversy "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United States* (1993). In such a case, we have held that a court lacks the authority to decide the dispute before it.

The lower courts ruled that this case involves a political question because deciding Zivotofsky's claim would force the Judicial Branch to interfere with the President's exercise of constitutional power committed to him alone. The District Court understood Zivotofsky to ask the courts to "decide the political status of Jerusalem." . . .

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The existence of a statutory right, however, is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To

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.

Moreover, because the parties do not dispute the interpretation of [the statute], the only real question for the courts is whether the statute is constitutional. At least since *Marbury v. Madison* (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." . . .

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The Secretary contends that "there is 'a textually demonstrable constitutional commitment'" to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. . . . Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is "aggrandizing its power at the expense of another branch." . . .

Our precedents have also found the political question doctrine implicated when there is "'a lack of judicially discoverable and manageable standards for resolving'" the question before the court. . . .Framing the issue as the lower courts did, in terms of whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns. They dissipate, however, when the issue is recognized to be the more focused one of the constitutionality of [the federal statute]. . . .

[T]he Secretary reprises on the merits her argument on the political question issue, claiming that the Constitution gives the Executive the exclusive power to formulate recognition policy. She roots her claim in the Constitution's declaration that the President shall "receive Ambassadors and other public Ministers." . . .

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For his part, Zivotofsky argues that, far from being an exercise of the recognition power, [the statute] is instead a "legitimate and permissible" exercise of Congress's "authority to legislate on the form and content of a passport." . . .

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Recitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not "turn on standards that defy judicial application." Resolution of Zivotofksy's claim demands 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. The political question doctrine poses no bar to judicial review of this case.

To say that Zivotofsky's claim presents issues the Judiciary is competent to resolve is not to say that reaching a decision in this case is simple. . . . Having determined that this case is justiciable, we leave it to the lower courts to consider the merits in the first instance.

The judgment of the Court of Appeals for the D. C. Circuit is vacated, and the case is remanded. . . .

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring in part.

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In my view, the *Baker v. Carr* (1962) factors reflect three distinct justifications for withholding judgment on the merits of a dispute. When a case would require a court to decide an issue whose

resolution is textually committed to a coordinate political department . . . abstention is warranted because the court lacks authority to resolve that issue. . . .

. . . . When 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 by Article III. . . .

. . . . A court may not refuse to adjudicate a dispute merely because a decision "may have significant political overtones" or affect "the conduct of this Nation's foreign relations." . . . Nor may courts decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches.

. . . . [I]t 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. . . .

When such unusual cases arise, abstention accommodates considerations inherent in the separation of powers and the limitations envisioned by Article III, which conferred authority to federal courts against a common-law backdrop that recognized the propriety of abstention in exceptional cases. . . . The political questions envisioned by *Baker*'s final categories find common ground, therefore, with many longstanding doctrines under which considerations of justiciability or comity lead courts to abstain from deciding questions whose initial resolution is better suited to another time. . . .

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. . . . To decide [the question at issue], a court must determine whether the statute is constitutional, and therefore mandates the Secretary of State to issue petitioner's desired passport, or unconstitutional, in which case his suit is at an end. Resolution of that issue is not one "textually committed" to another branch; to the contrary, it is committed to this one. In no fashion does the question require a court to review the wisdom of the President's policy toward Jerusalem or any other decision committed to the discretion of a coordinate department. For that reason, I agree that the decision below should be reversed.

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In my view, it is not whether the evidence upon which litigants rely is common to judicial consideration that determines whether a case lacks judicially discoverable and manageable standards. Rather, it is whether that evidence in fact provides a court a basis to adjudicate meaningfully the issue with which it is presented. The answer will almost always be yes, but if the parties' textual, structural, and historical evidence is inapposite or wholly unilluminating, rendering judicial decision no more than guesswork, a case relying on the ordinary kinds of arguments offered to courts might well still present justiciability concerns.

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JUSTICE ALITO, concurring.

This case presents a narrow question, namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport. . . .

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Under our case law, determining the constitutionality of an Act of Congress may present a political question, but I do not think that the narrow question presented here falls within that category. Delineating the precise dividing line between the powers of Congress and the President with respect to the contents of a passport is not an easy matter, but I agree with the Court that it does not constitute a political question that the Judiciary is unable to decide.

JUSTICE BREYER, dissenting.

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Justice Sotomayor [observes that the circumstances in which] prudential considerations lead the Court not to decide a case otherwise properly before it are rare. I agree. But in my view we nonetheless have before us such a case. Four sets of prudential considerations, taken together, lead me to that conclusion.

First, the issue before us arises in the field of foreign affairs. . . . The Constitution primarily delegates the foreign affairs powers "to the political departments of the government, Executive and Legislative," not to the Judiciary. . . .

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Second, if the courts must answer the constitutional question before us, they may well have to evaluate the foreign policy implications of foreign policy decisions. . . .

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Were the statutory provision undisputedly concerned only with purely administrative matters (or were its enforcement undisputedly to involve only major foreign policy matters), judicial efforts to answer the constitutional question might not involve judges in trying to answer questions of foreign policy. But in the Middle East, administrative matters can have implications that extend far beyond the purely administrative. . . .

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Third, the countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones. Zivotofsky does not assert the kind of interest, e.g., an interest in property or bodily integrity, which courts have traditionally sought to protect. . . . Nor, importantly, does he assert an interest in vindicating a basic right of the kind that the Constitution grants to individuals and that courts traditionally have protected from invasion by the other branches of Government. . . .

Fourth, insofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have nonjudicial methods of working out their differences. . . .

The upshot is that this case is unusual both in its minimal need for judicial intervention and in its more serious risk that intervention will bring about "embarrassment," show lack of "respect" for the other branches, and potentially disrupt sound foreign policy decisionmaking. . . .