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Simplifying the Prophecy of Justiciability in Cases Concerning Foreign Affairs: A Political Act of State Question

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SIMPLIFYING THE PROPHECY OF JUSTICIABILITY IN CASES CONCERNING FOREIGN AFFAIRS: A POLITICAL ACT OF STATE QUESTION

Deborah Azar

Justiciability doctrines in the foreign affairs arena have been described as involving large elements of prophecy. First, this article will examine the justifications and application of the political question doctrine in cases involving foreign affairs. Second, this article will discuss the justifications and application of the act of state and political question doctrines. Third, this article will analyze whether the act of state doctrine can be encompassed within the political question doctrine. Fourth, this article will propose a framework that can be applied in cases involving political questions in foreign affairs.

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I. INTRODUCTION

Justiciability doctrines in the foreign affairs arena have been described as involving large elements of prophecy.¹ In the oral arguments for *Austria v. Altmann*² Justice Breyer suggested the act of state doctrine apply in the following way:

[T]here’s a foreign policy interest here, and so that way the State Department’s in control, and if it feels that it would hurt foreign affairs to have the suit go ahead, it says either act of state if it’s not clear or a statement of interest, and a - which is a kind of political question, I guess.³

Due to the confusion about and overlap of the justiciability doctrines, there has been a call for their consolidation.⁴

This article will argue that the act of state doctrine should be a subcategory of the political question doctrine, because both notions are based on the same principles and are applied in the same way, and this would simplify the application of justiciability doctrines in cases

¹ *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id.

² Transcript of Oral Argument, *Aus. v. Altmann*, 541 U.S. 677 (2004) (No. 03-13), available at 2004 U.S. Trans. LEXIS 15; Audio Tape: The Oyez Project, *Aus. v. Altmann—Oral Argument* (Feb. 24, 2004), available at http://oyez.org/cases/2000-2009/2003/2003_03_13/argument.

³ The Oyez Project, *supra* note 2, at 22:52.

⁴ Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 700 (1990).

concerning foreign affairs.⁵ One of the situations in which the Supreme Court deems the political question doctrine applicable is in cases involving foreign affairs.⁶ The justifications for deeming cases involving foreign affairs non-justiciable are based on separation of powers and the fact that those issues demand that the government speak with one voice.⁷ The act of state doctrine, stating that courts in the United States will not adjudicate cases involving public acts of a recognized foreign sovereign in its own territory,⁸ is based on these same considerations.⁹ Therefore, the act of state doctrine should be analyzed under the umbrella of the political question doctrine.¹⁰

First, this article will examine the justifications and application of the political question doctrine in cases involving foreign affairs.¹¹ Second, this article will discuss the justifications and application of the act of state and political question doctrines.¹² Third, this article will analyze whether the act of state doctrine can be encompassed within the political question doctrine.¹³ Fourth, this article will propose a framework that can be applied in cases involving political questions in foreign affairs.¹⁴

II. BACKGROUND

A. *Application of the Political Question Doctrine in International Cases*

1. *What is a Political Question in Cases Involving Foreign Affairs?*

The political question doctrine is based on the relationship between the judicial branch and the other branches of the federal government.¹⁵ The non-justiciability “of a political question is primarily a function of the separation of powers.”¹⁶ Whether a case presents a political question must be decided on a case-by-case basis.¹⁷ The political question doctrine involves “[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of gov-

⁵ See *infra* Part V.

⁶ See *infra* notes 15-32 and accompanying text.

⁷ See *infra* note 29 and accompanying text.

⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

⁹ See *infra* notes 96-104 and accompanying text.

¹⁰ See *infra* note 208 and accompanying text.

¹¹ See *infra* Part II A.

¹² See *infra* Part II B.

¹³ See *infra* Part III.

¹⁴ See *infra* Part IV.

¹⁵ *Baker v. Carr*, 369 U.S. 186, 210 (1962).

¹⁶ *Id.*

¹⁷ *Id.* at 210-11.

ernment, or whether the action of that branch exceeds whatever authority has been committed.”¹⁸

The factors that a court must take into account when deciding whether a case falls within the political question doctrine are:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving it; the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹

The political question doctrine has roots in a seminal case for the exercise of judicial review.²⁰ In *Marbury v. Madison*, the Supreme Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²¹ However, in that case the Court also mentioned that cases involving mere political acts, belonging to the executive department alone, are not to be adjudicated by the Supreme Court.²² The Court wondered if the case at hand involved a political question:

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy[?] That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.²³

The concept of political question was clarified in *Luther v. Borden*, where the Court held that where the Constitution has treated a

¹⁸ *Id.* at 211.

¹⁹ *Id.* at 217.

²⁰ *Marbury v. Madison*, 5 U.S. 137 (1803).

²¹ *Id.* at 177.

²² *Id.* at 164.

²³ *Id.*

subject as political in its nature and placed the power in another branch of government, the courts cannot exercise their power.²⁴

The Constitution of the United States has treated the subject as political in its nature, and placed the power of recognizing a State government in the hands of Congress. Under the existing legislation of Congress, the exercise of this power by courts would be entirely inconsistent with that legislation. The President of the United States is vested with certain power by an act of Congress, and in this case he exercised that power by recognizing the charter government.²⁵

The Supreme Court in *Baker v. Carr* argued that issues concerning foreign relations are political questions.²⁶ The Court explained that many questions concerning foreign relations “turn on standards that defy judicial application,” “involve the exercise of a discretion demonstrably committed to the executive or legislature,” or “uniquely demand single-voiced statement of the Government’s views.”²⁷ In *Baker v. Carr*, risking the “embarrassment of our government abroad” was cited as a case of political question, contrasting that scenario with the case actually decided.²⁸ “The cases concerning . . . foreign affairs, for example, are usually explained by the necessity of the country’s speaking with one voice in such matters.”²⁹

²⁴ *Luther v. Borden*, 48 U.S. 1, 2 (1849).

²⁵ *Id.*

[*Luther v. Borden*] arose out of the Dorr rebellion of 1842 against the charter government of Rhode Island. The traditional view of the case is that when asked to consider whether the charter government violated the article IV, section 4 guarantee of a republican form of government, the Court invoked the political question doctrine because of the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.

Martin H. Redish, *Judicial Review and the “Political Question,”* 79 *Nw. U. L. Rev.* 1031, 1036 (1984).

²⁶ *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

²⁷ *Id.* at 211.

²⁸ *Id.* at 226 (holding that reapportionment of voting districts does not constitute a political question and is a justiciable matter).

²⁹ *Id.* at 281.

However, courts have discretion in determining if a case involves matters concerning justiciability,³⁰ and the fact that a case falls within the realm of foreign affairs does not mean that a court will not decide it.³¹ The Court reserves the exercise of discretion in applying the political question doctrine: “Of course, judgment concerning the ‘political’ nature of even a controversy affecting the Nation’s foreign affairs is not a simple mechanical matter, and [several] of the Court’s decisions have accorded scant weight to the consideration of unity of action in the conduct of external relations.”³²

2. *Justifications for the Political Question Doctrine*

There has been a lot of debate concerning the justifications, and even some doubt as to the existence³³ of the political question doctrine.³⁴ This article will compare the classical,³⁵ prudential,³⁶ and aggregate³⁷ theories that have been used to justify the political question doctrine.

The classical theory, argued by Wechsler,³⁸ states that the political question doctrine should only be used when the Constitution has committed the determination of the issue in question to another branch of the government.³⁹ In contrast, the prudential theory, argued by Bickel,⁴⁰ holds that the political question doctrine is based on:

³⁰ See Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CAL. L. REV. 1515, 1568 (2007).

³¹ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

³² See *id.* at 211 (citing *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); *U.S. v. Pink*, 315 U.S. 203 (1942)).

³³ See generally Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976).

³⁴ See *infra* notes 46-48 and accompanying text.

³⁵ See generally Redish, *supra* note 25, at 1039.

³⁶ See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 183-98 (1962).

³⁷ The theory proposed by Louis Henkin does not have a label. This comment will call it aggregate theory because it maintains that the political question is an aggregate of existing doctrines and principles. See generally Henkin, *supra* note 33.

³⁸ Herbert Wechsler (1909-2000) was a professor at Columbia Law School and the director of the American Law Institute for twenty-one years. Professor Wechsler specialized in constitutional law, federal courts, and criminal law. Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES, April 28, 2000, at C21, available at <http://www.nytimes.com/2000/04/28/us/herbert-wechsler-legal-giant-is-dead-at-90.html>.

³⁹ “Wechsler has argued that the only appropriate use of a political question doctrine is to guide the Court in deciding under what circumstances ‘the Constitution has committed to another agency of government [than the courts] the . . . determination of the issue.’” Redish, *supra* note 25, at 1039.

⁴⁰ Alexander Bickel (1924-1974) was a professor at Yale Law School who specialized in constitutional law. Lawrence Van Gelder, *Alexander M. Bickel Dies; Con-*

the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.⁴¹

The prudential theory seems to stem from a legal realistic approach to jurisprudence.⁴² In response to this theory, but still within a prudential and legal realistic perspective, Jaffe⁴³ argues that the problem is not that the courts cannot develop workable standards that would solve the issue in question in each specific case, but that the courts should not develop those standards because society would be either better off without rules, or rules should only be one factor among other considerations that a court should take into account.⁴⁴ One of the dominant considerations is "the lack of satisfactory criteria for a judicial determination."⁴⁵

On the other hand, Henkin⁴⁶ contends that the political question doctrine does not exist.⁴⁷ Henkin concludes that the political

stitutional Law Expert; A Legal Conservative, N.Y. TIMES, November 8, 1974, at ABS 42.

⁴¹ Redish, *supra* note 25, at 1043 (citing BICKEL, *supra* note 36, at 183-98).

⁴² Legal realism is a theory of jurisprudence that maintains that the law is the creation of judges responding to individual facts and policies. Brian Leiter, *Rethinking Legal Realism: Toward A Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275-76 (1997).

⁴³ Louis Jaffe (1906-1996) was a professor at Harvard Law School who specialized in administrative law. *Louis L. Jaffe, 90, Noted Legal Scholar*, N.Y. TIMES, Dec. 15, 1996, at ABS 168, available at <http://www.nytimes.com/1996/12/15/us/louis-l-jaffe-90-noted-legal-scholar.html>.

⁴⁴ Jaffe, however, has argued that in certain instances the point is not that the courts *cannot* develop workable standards, but that they *should* not. Many of the questions that arise are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules. We may believe that the job is better done without rules, or that even though there are applicable rules, these rules should be only among the numerous relevant considerations. Redish, *supra* note 25, at 1047.

⁴⁵ *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939).

⁴⁶ Louis Henkin is a professor emeritus at Columbia Law School who specializes in constitutional and international law. http://www.law.columbia.edu/fac/Louis_Henkin.

⁴⁷ Henkin, *supra* note 33, at 598-99.

question doctrine is an unnecessary packaging of several established doctrines, but is no more than the sum of its parts.⁴⁸

B. Act of State Doctrine

1. What Is the Act of State Doctrine?

The act of state doctrine⁴⁹ states that courts in the United States,⁵⁰ both federal and state,⁵¹ cannot adjudicate public acts that a recognized foreign sovereign power commits within its own territory.⁵² This doctrine is applicable when the relief sought would require a court in the United States to declare invalid an official act of a foreign sovereign.⁵³ It does not matter whether the act violates domestic law of the foreign country or international law.⁵⁴ The act of state doctrine is not compelled by the doctrine of sovereign immunity.⁵⁵

⁴⁸ *Id.* at 622.

⁴⁹ For a good summary of the act of state doctrine, including its exceptions and application, see Andrew D. Patterson, *The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine are Wrong*, 15 U.C. DAVIS J. INT'L L. & POL'Y 111 (2008).

⁵⁰ Courts in other common law jurisdictions also apply the act of state doctrine. See *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* [1921] 3 KB 532, 548; *Princess Paley Olga v. Weisz* [1929] 1 KB 718, 725; *Buttes Gas and Oil Co v. Hammer (No 3)* [1982] AC 888.

⁵¹ See *Matter of Doe*, 868 N.Y.S.2d 40, 46 (N.Y. App. Div. 2008); *People v. Almonte*, 740 N.Y.S.2d 763, 771 (N.Y. App. Div. 2002); *Atty. Griev. Comm'n v. Sheinbein*, 812 A.2d 981, 1016 (Md. 2002); *Roxas v. Marcos*, 969 P.2d 1209, 1246-47 (Haw. 1998).

⁵² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

⁵³ *World Wide Minerals, LTD. v. Republic of Kaz.*, 296 F.3d 1154, 1164 (2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 401 (1964)).

⁵⁴ *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. at 423.

⁵⁵ *Id.* at 421.

We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decision[s] seem to imply. . . . If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it. The refusal of one country to enforce the penal laws of another . . . is a typical example of an instance when a court will not entertain a cause of action arising in another jurisdiction. While historic notions of sovereign authority do bear upon the wisdom [of] employing the act of state doctrine, they do not dictate its existence. .

Id.

Modern act of state doctrine has its roots in *Banco Nacional de Cuba v. Sabbatino*, where⁵⁶ the Supreme Court applied the act of state doctrine to uphold an expropriation by the Cuban government as a defense to the rights of an American commodity broker to a cargo of sugar under a bill of lading.⁵⁷

The District Court for the Central District of California has applied *Sabbatino* by analyzing three factors:

- (1) 'the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it;'
- (2) 'the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches;'
- and (3) whether 'the government which perpetrated the challenged act of state is no longer in existence.'⁵⁸

However, the Supreme Court in *Sabbatino* did not apply those three factors to the facts of the case in the way that the district court did, merely by counting which factors were met and which factors were not.⁵⁹ Instead, the Supreme Court in *Sabbatino* used those factors, along with others, to explain the rationale of the act of state doctrine.⁶⁰

The act of state doctrine cannot be applied inconsistently with sovereign immunity.⁶¹ The Foreign Sovereign Immunities Act⁶² lists many exceptions to foreign sovereign immunity, such as an action based on commercial activity, cases in admiralty, and actions in violation of international law.⁶³ Such exceptions leave open lacunae where the act of state doctrine operates.⁶⁴

The act of state doctrine also leaves a lot of discretion to the courts in its application. In *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, the Supreme Court stated that

⁵⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 420.

⁵⁷ *Id.* at 401-08; see also BLACK'S LAW DICTIONARY 176 (8th ed. 2004) (quoting WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 380 (Arthur L. Corbin ed., 3d Am. ed. 1919)). A bill of lading is a document that represents at the same time: a receipt for the goods shipped, the contract with the terms of the shipping, and title to the goods shipped before they arrive at their destination.

⁵⁸ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1190 (2005) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964)).

⁵⁹ Compare *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 420, with *Mujica*, 381 F. Supp. 2d at 1190-91.

⁶⁰ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 427-28.

⁶¹ See *id.* at 430.

⁶² 28 USCS § 1602-11 (1976).

⁶³ *Id.* at § 1605.

⁶⁴ See *Letelier v. Republic of Chile*, 488 F. Supp. 665, 674 (1980); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1112 (1985).

“sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application.”⁶⁵

2. *The Act of State Doctrine and Erie*

The status of the act of state doctrine after *Erie v. Tompkins* is not settled.⁶⁶ Under the *Erie* doctrine,⁶⁷ except for matters governed by the Constitution or by federal statutes, federal courts must apply the common law substantive rules of the state in which they sit.⁶⁸ After the *Erie* decision, there is no longer federal common law.⁶⁹ However, there is controversy about the status of international federal common law following the decision.⁷⁰ Specifically, there is still controversy regarding the role of federal non-statutory law concerning foreign relations after *Erie*.⁷¹ Revisionists claim that there needs to be authorization from Congress prior to the application of customary international law in federal courts.⁷² Traditionalists, by contrast, claim that customary international law is self-executing, and thus federal courts do not need congressional authorization to apply customary international law.⁷³ Traditionalists read the holding of *Erie* narrowly to mean that “because ‘Congress has no power to declare substantive rules of common law applicable in a State,’ there is a corresponding lack of jurisdiction on the part of the federal judiciary to fashion a federal common law of tort.”⁷⁴ Therefore, the application of the act of state doctrine can be viewed as legitimate or illegitimate, depending

⁶⁵ *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l.*, 493 U.S. 400, 409 (1990).

⁶⁶ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶⁷ *See generally* *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

⁶⁸ *Erie*, 304 U.S. at 79.

⁶⁹ *Id.*

⁷⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725-26 (2004).

⁷¹ Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 4 (2009); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1239 n.27 (2007); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁷² Daniel Ryan Koslosky, *Ghosts of Horace Gray: Customary International Law as Expectation in Human Rights Litigation*, 97 KY. L.J. 615, 633 (2008).

⁷³ *Id.* at 334.

⁷⁴ *Id.* (quoting *Erie*, 304 U.S. at 78).

on whether it is viewed under the revisionist or traditionalist theories and whether it is viewed as procedural or substantive law.⁷⁵

3. *Exceptions to the Act of State Doctrine*

Even though application of the act of state doctrine is discretionary, the act of state doctrine has notable exceptions.⁷⁶ One exception was formulated in *Bernstein v. Van Heyghen Freres S.A.*, which states the act of state doctrine is inapplicable where the executive branch has clearly indicated that it does not object to the court determining the validity of the foreign state's act.⁷⁷

Another exception, recognized only by a plurality in *Alfred Dunhill of London, Inc. v. Cuba*, is the commercial activities exception.⁷⁸ Purely commercial obligations owed by a foreign state or one of its instrumentalities are not an act of state wherein the act of state doctrine would apply.⁷⁹ Circuit courts are split as to whether they recognize the commercial activities exception.⁸⁰ The Eleventh Circuit has rejected the commercial activities exception.⁸¹ The Sixth Circuit expressed doubts as to the precedential value of an exception recognized by a plurality opinion.⁸² The Third,⁸³ Fifth,⁸⁴ and Ninth⁸⁵ Circuits

⁷⁵ Daniel Ryan Koslosky, *Ghosts of Horace Gray: Customary International Law as Expectation in Human Rights Litigation*, 97 KY. L.J. 615, 634-35 (2008).

⁷⁶ Other common law jurisdictions have established public policy exceptions to the act of state doctrine. In *Kuwait Airways Corp v. Iraqi Airways Co. (No. 4&5)* the House of Lords held that an act that "is in breach of clearly established principles of public international law" does not fall under the act of state doctrine. *Kuwait Airways Corporation v. Iraqi Airways Co.* [2002] 2 AC 883, 949 (Lord Nicholls); see also at 1108-11 (Lord Brooke). The Federal Court of Australia has accepted that public policy exception in *Hicks v. Ruddock*. *Hicks v. Ruddock* (2007) 156 FCR 574, 600.

⁷⁷ *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249-50 (2d Cir. 1947).

⁷⁸ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

⁷⁹ *Id.* at 695-705.

⁸⁰ Jason E. Prince, *Does 'Act Of State' Mean 'Out Of Luck'?: The Perils Of Doing Business With Foreign States And Their State-Owned Companies*, 52-OCT ADVOC. (Idaho) 21, 22 (2009).

⁸¹ *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 550 (11th Cir. 1997).

⁸² *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't. of Socialist Ethiopia*, 729 F.2d 422, 425 n.3 (6th Cir. 1984).

⁸³ *Env'tl. Tectronics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1059 (3d Cir. 1988).

⁸⁴ *Airline Pilots Ass'n, Int'l, AFL-CIO, v. Taca Int'l Airlines, S.A.*, 748 F.2d 965, 970 n.2 (5th Cir. 1984).

⁸⁵ *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983).

have mentioned the existence of the commercial activities exception but have yet to state their position.⁸⁶

4. *Justifications for the Act of State Doctrine*

In its early stages, the accepted justification for the act of state doctrine was a conflicts of law argument.⁸⁷ However, from a choice of law perspective, “the act of state doctrine cannot be understood in any coherent fashion.”⁸⁸

Another related justification is international comity.⁸⁹ Comity of nations defines the extent with which the domestic laws of one country operate within another country.⁹⁰ Comity is not mandatory.⁹¹ It is a balance between recognition and consideration for other nations’ sovereignty and the host nation’s citizens’ rights.⁹² Courts have expressed the opinion that determining the validity of acts by a different country’s sovereign, instead of allowing conflicts to be resolved via diplomatic channels, could have negative effects on the involved parties’ foreign relations.⁹³ However, the justifications of conflicts of law and

⁸⁶ Gregory Fox talks about a “private act exception.” However, if there is no state action, the elements of the act of state doctrine are not met and thus there is no need for an exception. See Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*, 33 HARV. INT’L L.J. 521, 533-34 (1992).

⁸⁷ Melissa Waters, *The U.S. Supreme Court and International Law: Continuity or Change?*, 11 (manuscript) (on file with author); see also RESTATEMENT (FIRST) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (Proposed Official Draft 1962).

⁸⁸ Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*, 33 HARV. INT’L L.J. 521, 521 (1992).

⁸⁹ *Hilton v. Guyot*, 159 U.S. 113, 166 (1895)

All [of] the effect[s] which foreign laws can have in the territory of a state depends absolutely on the express or tacit consent of that state. . . . The express consent of a state to the application of foreign laws within its territory is given by acts passed by its legislative authority, or by treaties concluded with other states. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists. There is no obligation recognized by legislators, public authorities, and publicists to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of states, ‘ex comitate, ob reciprocam utilitatem.’

Id. (quoting WHEAT. INT. LAW (8th Ed.) §§ 78, 79).

⁹⁰ *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

⁹¹ *Id.*

⁹² *Id.* at 163-64.

⁹³ See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 550 (E.D.N.Y. 2008) (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918)).

international comity were rejected by *Sabbatino*,⁹⁴ which changed the focus from those two rationales to domestic factors.⁹⁵

One of the main contemporary justifications for the act of state doctrine is separation of powers. The act of state doctrine is a rule of deference.⁹⁶ This deference permits the executive power to take special circumstances into account during negotiations, thus providing the executive power with sufficient leeway to handle the resolution of multiple cases or controversies at once.⁹⁷

The act of state doctrine “is a reflection of the executive’s primary competency in foreign affairs, and an acknowledgment of the fact that in passing upon foreign governmental acts the judiciary may hinder or embarrass the conduct of our foreign relations.”⁹⁸ In *Sabbatino*, the Court stated that if an issue is codified or if there is consensus about that issue, then it is more appropriate for the judiciary to render decisions regarding that issue.⁹⁹ The Court also noted that when an issue is especially relevant to the United States’ foreign relations, there is greater justification for exclusivity within the executive and legislative branches of government.¹⁰⁰ Therefore, the act of state doctrine applies only to issues that fall within the exclusive power of the executive or legislative branches.¹⁰¹

While this deference is based on constitutional underpinnings, it is not required by the Constitution.¹⁰² Richard Falk¹⁰³ equates the deference used in applying the act of state doctrine to the deference used in applying the political question doctrine in that it is derived

⁹⁴ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411-20, 470-471 (1964).

⁹⁵ Patrick W. Pearsall, *Note: Means/Ends Reciprocity in the Act of State Doctrine*, 43 COLUM. J. TRANSNAT’L L. 999, 1008 (2005); Melissa Waters, *The U.S. Supreme Court and International Law: Continuity or Change?*, 11 (manuscript) (on file with author); see also Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2363 (1991).

⁹⁶ See Richard A. Falk, *The Role of Domestic Courts in the International Legal Order*, 75 (1964).

⁹⁷ *Id.* at 9.

⁹⁸ *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 108-09 (1971) (citing *Sabbatino* at 427-28, 431-33).

⁹⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 423-24.

¹⁰² Richard A. Falk, *The Aftermath of Sabbatino*. Background Papers and Proceedings of the Hammarskjöld Forum 17 (1965) (endnotes omitted).

¹⁰³ Richard Falk is a professor at Princeton University who specializes in international law. See generally Princeton Institute for International and Regional Studies, Associates – Richard Falk <http://www.princeton.edu/~piirs/people/index.html>.

from the Constitution, but is not so integral to the Constitution that it must always be applied.¹⁰⁴

C. What Others Have Said Regarding the Similarities Between the Act of State Doctrine and the Political Question Doctrine

The similarities between the act of state doctrine and the political question doctrine have been mentioned on numerous occasions, but have not been reconciled. In *First National City Bank v. Banco Nacional de Cuba*, a case in which the Supreme Court held that the act of state doctrine did not prevent litigation on the merits,¹⁰⁵ Justice Brennan applied the *Bernstein* exception in his dissent¹⁰⁶ and stated that the issue at hand was a political question.¹⁰⁷ Justice White in his dissent in *Alfred Dunhill of London v. Cuba* also commented on the similarities between the act of state doctrine and the political question doctrine.¹⁰⁸

The question of how to address the similarities between the political question doctrine and the act of state doctrine continues to be debated in modern academia. Michael Bazzyler¹⁰⁹ has proposed to resolve these similarities by doing away with the act of state doctrine.¹¹⁰ Thomas Sutcliffe has suggested the integration of the act of state doctrine into a broader analysis,¹¹¹ without exactly describing what that analysis would be. Anne-Marie Slaughter¹¹² criticizes Thomas

¹⁰⁴ Richard A. Falk, *The Aftermath of Sabbatino*. Background Papers and Proceedings of the Hammarskjöld Forum 17 (1965) (endnotes omitted).

¹⁰⁵ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

¹⁰⁶ *See supra* note 77 and accompanying text.

¹⁰⁷ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. at 787-89 (Brennan, J., dissenting).

¹⁰⁸ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 727 (1976) (White, J., dissenting).

¹⁰⁹ Michael Bazzyler is a professor at Chapman University School of Law who specializes in international law. MICHAEL J. BAZZYLER – BIOGRAPHY, CHAPMAN UNIVERSITY SCHOOL OF LAW, <http://www.chapman.edu/law/faculty/bazzyler.asp> (last visited June 21, 2010).

¹¹⁰ *See* Michael J. Bazzyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 341 (1986).

¹¹¹ Thomas Sutcliffe is a J.D. Candidate at Boston University School of Law, 2009. *See* Thomas R. Sutcliffe, Comment, *"The Nile Reconstituted": Executive State-ments, International Human Rights Litigation, and the Political Question Doctrine*, 89 B.U. L. REV. 295, 327 (2009).

¹¹² Anne-Marie Slaughter is a professor at Princeton University who specializes in international law. *See* Anne-Marie Slaughter – Biography, Princeton University, <http://www.princeton.edu/~slaughttr/SlaughterCV2.pdf> (last visited June 21, 2010).

Franck's¹¹³ failure to mention Justice Brennan's¹¹⁴ characterization.¹¹⁵ These efforts, however, have not been adopted by the courts, which continue to try to find a way to address the similarities between the act of state doctrine and the political question doctrine.

D. Contemporary Application of the Act of State and Political Question Doctrines

Courts are not always at ease with the application of the act of state doctrine and its connection with the political question doctrine. The issue of the similarity between the act of state doctrine and the political question doctrine was brought up by the Supreme Court in oral arguments in *Dole Food Co. v. Patrickson*,¹¹⁶ where Justice Scalia¹¹⁷ suggested application of the act of state doctrine:

You know, there - I - I just don't agree with you that that's - that's the policy of the United States. There - apart from who can get into Federal court, there - there is in Federal law a thing called the Act of State Doctrine under which we will - we will honor and accept the action of a foreign country conducted within its own borders and will not allow that to be challenged in a suit in the United States. It's a - it's a longstanding doctrine, and yet we do - certainly do not say that any time an act of State is involved in a piece of litigation, there's Federal jurisdiction.¹¹⁸

Justice Scalia's words suggest the fact that the attorneys litigating the case did not include the act of state doctrine at any stage of the proceedings up to the oral argument in the Supreme Court.¹¹⁹ Moreover, the quote shows the hesitation and difficulty with which the

¹¹³ Thomas Franck (1932-2009) was a professor at New York University School of Law who specialized in international law. Dennis Hevesi, *Thomas Franck, Who Advised Countries on Law, Dies at 77*, N.Y. TIMES, May 29, 2009, at A12, available at <http://www.nytimes.com/2009/05/30/nyregion/30franck.html> (last visited June 21, 2010).

¹¹⁴ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787-89 (1972) (Brennan, J., dissenting).

¹¹⁵ See Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?* 106 HARV. L. REV. 1980, 2002 (1993) (reviewing Thomas M. Frank, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)).

¹¹⁶ *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

¹¹⁷ Justice Scalia is the author of one of the most recent opinions by the Supreme Court on the act of state doctrine: *W. S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990).

¹¹⁸ Transcript of Oral Argument at 13-14, *Dole*, 538 U.S. 468 (No. 01-593).

¹¹⁹ See *id.*

existence of the act of state doctrine and its application to the case was suggested.¹²⁰

In recent cases, courts have been considering both the political question doctrine and the act of state doctrine as if they were the same or very similar.¹²¹ In *Sarei v. Rio Tinto*, the Ninth Circuit recently referred to the act of state doctrine and the political question doctrine and stated that “a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.”¹²² In *In re Yukos Oil*, the court pointed out that the act of state doctrine can be viewed both as a rule of decision and a principle of abstention.¹²³ In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the act of state doctrine, the political question doctrine, and comity of nations are treated together as requiring the assertion of the relevant foreign policy of the executive branch and interference with that policy.¹²⁴

As one district court has observed, in determining whether to invoke the act of state, political question or comity of nations doctrines, the court must first ascertain the relevant foreign policy of the executive branch, and then assess whether adjudication of the claims before it will unduly interfere with that policy. In conducting this analysis, the court must accept the statement of foreign policy provided by the executive branch as conclusive of its view of that subject; it may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning.¹²⁵

It seems that it would not matter whether the parties assert the act of state doctrine or the political question doctrine; the result will be that the court cannot interfere with the policy asserted by the executive power.¹²⁶

¹²⁰ *See id.*

¹²¹ *See supra* 117-120 and accompanying text. *See infra* notes 122-139 and accompanying text.

¹²² *Sarei v. Rio Tinto*, PLC, 550 F.3d 822, 825 n.1, (citing *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, (2007)).

¹²³ *In re Yukos Oil Co. Sec. Litig.*, 2006 U.S. Dist. LEXIS 78067, at *22 n.3 (S.D.N.Y. 2006); *see In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 558-59 (E.D.N.Y. 2008); *see also Nocola v. UGS Corp.*, 520 F.3d 719, 728 (2008).

¹²⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 U.S. Dist. LEXIS 18399, at *22 n.9 (S.D.N.Y. 2005) (citing *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972)).

¹²⁵ *Id.*

¹²⁶ *See id.*

In *Austria. v. Altmann*, the Supreme Court raises the issue of whether the act of state doctrine is a jurisdictional procedural defense or a substantive defense on the merits.¹²⁷ In *Sharon v. Time, Inc.*, the District Court for the Southern District of New York also observed the similarities between the act of state doctrine and the political question doctrine.¹²⁸ The court emphasized the similarities in the Supreme Court analysis when determining justiciability under both doctrines.¹²⁹ The court also underscored the similarities of the considerations weighed and the process used in weighing those considerations on a case-by-case basis when determining whether a judicial or a political decision is best.¹³⁰

The Court of Appeals for the Second Circuit was more direct in asserting that the act of state doctrine is a doctrine of justiciability and not a jurisdictional doctrine.¹³¹ In *United Bank, Ltd. v. Cosmic International, Inc.*, the court stated that “[t]he act of state doctrine is the equivalent in international law of the ‘political question doctrine’, and was devised to prevent intrusion by our courts into the political affairs of foreign countries.”¹³² A different court, when analyzing the deference that should be accorded to a United States Statement of Interest in a case, referred to the application under the political question doctrine.¹³³

Similarly, the Ninth Circuit has stated that:

The act of state doctrine is similar to the political question doctrine in domestic law. It requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question. Like the political question doctrine, its applicability is not subject to clear definition. The courts balance various factors to determine whether the doctrine should apply.¹³⁴

In *Matar v. Dichter*, the court noted that because the political question doctrine was sufficient to dismiss the case, it did not need to

¹²⁷ Rep. of Aus. V. Altmann, 541 U.S. 677, 700-01 (2004).

¹²⁸ Sharon v. Time, Inc., 599 F. Supp. 538, 548 (S.D.N.Y. 1984).

¹²⁹ *Id.* at 547 (citing Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918)).

¹³⁰ Sharon v. Time, Inc., 599 F. Supp. at 548.

¹³¹ 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia, 218 F.3d 152, 162-63 (2d Cir. 2000).

¹³² United Bank, Ltd. v. Cosmic Int'l, Inc., 392 F. Supp. 262, 269 (S.D.N.Y. 1975).

¹³³ Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 347 (S.D.N.Y. 2003).

¹³⁴ Int'l Ass'n. of Machinists & Aerospace Workers, (IAM) v. Org. of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1358-59 (9th Cir. 1981).

consider the act of state doctrine.¹³⁵ In *Mujica v. Occidental Petroleum Corp.*, after weighing four factors the court decided that the act of state doctrine did not apply and instead applied the political question doctrine.¹³⁶

These cases show that there is a tendency in contemporary cases to consider the act of state doctrine and the political question doctrine simultaneously and evaluate them at the same time, using similar reasoning.¹³⁷ These cases also illustrate the confusion in the application of and justifications for the act of state doctrine.¹³⁸ This article will determine how simplifying the use of justiciability doctrines in cases involving foreign affairs can be accomplished by examining the application and justifications of the political question doctrine and the act of state doctrine.¹³⁹

III. IDENTIFICATION OF THE PROBLEM

In recent years, there has been an increased amount of incorporation of principles from international law into domestic law.¹⁴⁰ The act of state doctrine, however, is not a rule of international law that has been internalized, but is a rule of domestic law that has effects in the international arena.¹⁴¹ However, the fact that the act of state doctrine is not in itself a rule of international law but rather is a domestic law that internalizes principles of international law does not make attorneys and judges less adverse to its application.¹⁴² One way for U.S.

¹³⁵ *Matar v. Dichter*, 500 F. Supp. 2d 284, 296 n.5 (S.D.N.Y. 2007).

¹³⁶ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1190-95 (2005).

¹³⁷ See *supra* notes 117-136 and accompanying text.

¹³⁸ See *id.*

¹³⁹ See *infra* Part V.

¹⁴⁰ Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 53 (2008).

Regardless of one's position in this debate, it seems fair to say that all discussion so far has been confined to the question of change and continuity in the domestic Constitution. By 'domestic' I mean the Constitution as it applies to the regulation of: (1) relations among the three branches of the national government in their governance of the country (separation of powers); (2) relations between national and state governments (federalism); and (3) the relations between the government (both national and state) and American citizens (individual rights).

Id.

¹⁴¹ Foreign sovereign immunity can be interpreted as a norm of international law that countries have internalized. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 668 (1998).

¹⁴² See Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism*, 35 HOUS. L. REV. 683, 686 (1998).

courts to use more principles of international law is to incorporate these principles into domestic law.¹⁴³ The Supreme Court has not traditionally decided cases on the status of international law in the domestic arena, generally leaving those issues to be debated by the lower courts and academics.¹⁴⁴

Incorporating the act of state doctrine under the political question doctrine would permit courts to address questions of international law more easily by characterizing issues in a case as questions of domestic law with which attorneys and judges are familiar.¹⁴⁵ Instead of having to argue both the political question doctrine and the act of state doctrine, attorneys could just argue the political question doctrine.¹⁴⁶ Then, courts could analyze the political question doctrine and the act of state doctrine at the same time without devoting space in the opinion to a discussion concerning which doctrine is applicable to the case.¹⁴⁷ Thus, courts would be more likely to apply the act of state doctrine where it is pertinent.¹⁴⁸

IV. ANALYSIS

In order to analyze the viability of incorporating the act of state doctrine into the political question doctrine this section will consider the hurdles that would be involved in such unification. First, this section will analyze whether there are constitutional obstacles to the union of the act of state doctrine and the political question doctrine.¹⁴⁹ Second, this section will analyze whether the political question doc-

¹⁴³ See *id.* at 695.

¹⁴⁴ Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*, 33 HARV. INT'L L.J. 521, 521 (1992).

¹⁴⁵ *Id.* This is in part because of the lack of focus on international law in American legal education. In 1960, only 75 out of 124 law schools offered a course related to international law. AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON WORLD PEACE THROUGH LAW, A SURVEY OF COURSES OFFERED IN THE LAW SCHOOLS OF THE UNITED STATES IN INTERNATIONAL AND RELATED SUBJECTS 1-2 (1960). Fordham Law School did not include courses in international law on a permanent basis until 1962. Joseph C. Sweeney, *International Law at Fordham Law School* 29 FORDHAM INT'L L.J. 1139, 1142-43 (2006). In 1991, less than 45% of law students took a class related to international law. JOHN KING GAMBLE, TEACHING INTERNATIONAL LAW IN THE 1990s 122-23 (1993). However, there is a trend of schools offering and requiring courses related to international law, and more attorneys and judges in the future will be well versed in international law. See John King Gamble, *Teaching or Get off the Lectern: Impediments to Improving International Law Teaching*, 13 ILSA J. Int'l & Comp. L. 379, 382 (2007).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *infra* Part IV A.

trine exists and, if so, what its scope is with regard to the act of state doctrine.¹⁵⁰ Third, this section will consider why the suggestions to abolish the act of state doctrine are not advisable.¹⁵¹ Fourth, this section will consider the impact that incorporating the act of state doctrine into the political question doctrine would have on the issues raised on cases analyzing both doctrines.¹⁵² Finally, this section will analyze the impact of the incorporation of the act of state doctrine into the political question doctrine regarding the problem presented to the act of state doctrine by *Erie v. Tompkins*.¹⁵³

Justice Brennan, who wrote the majority opinion in *Baker v. Carr*,¹⁵⁴ wrote a dissenting opinion in *First National City Bank v. Banco Nacional de Cuba*, in which he stated that *Sabbatino* held that the validity of an act of state is a political question.¹⁵⁵

In short, *Sabbatino* held that the validity of a foreign act of state in certain circumstances is a “political question” not cognizable in our courts. Only one - and not necessarily the most important - of those circumstances concerned the possible impairment of the Executive’s conduct of foreign affairs. Even if this factor were absent in this case because of the Legal Adviser’s statement of position, it would hardly follow that the act of state doctrine should not foreclose judicial review of the expropriation of petitioner’s properties. To the contrary, the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a “political question.” The Legal Adviser’s letter does not purport to affect these considerations at all. In any event, when coupled with the possible consequences to the conduct of our foreign relations explored above, these considerations compel application of the act of state doctrine, notwithstanding the Legal Adviser’s suggestion to the contrary. The Executive Branch, however, exten-

¹⁵⁰ See *infra* Part IV B.

¹⁵¹ See *infra* Part IV C.

¹⁵² See *infra* Part IV D.

¹⁵³ See *infra* Part IV E.

¹⁵⁴ *Baker v. Carr*, 369 U.S. 186, 212 (1962).

¹⁵⁵ *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787-89 (1972) (Brennan, J., dissenting).

sive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim.¹⁵⁶

This position was echoed by Justice White in *Alfred Dunhill of London v. Cuba*.¹⁵⁷

Some authors have criticized Justice Brennan for not fully explaining the reasoning behind this assertion.¹⁵⁸ “Justice Brennan did not explain why, if the act of state and political question doctrines were equivalent, act of state issues cannot simply be subsumed under the political question analysis.”¹⁵⁹ In this section, this article will provide arguments discussing why the act of state doctrine should fall under the political question doctrine umbrella.

A. Constitutional Underpinnings

Both the political question doctrine and the act of state doctrine are based on constitutional underpinnings.¹⁶⁰ This section will first analyze how the factors of the political question doctrine relate to the act of state doctrine; then, this section will analyze how the justifications for the political question doctrine and the act of state doctrine interrelate.

The factors that courts take into account, when deciding whether a case falls within the political question doctrine, are:

1. “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”¹⁶¹ In the case of the act of state doctrine there is authority suggesting that issues concerning foreign affairs are reserved for the executive branch.¹⁶²

2. “a lack of judicially discoverable and manageable standards for resolving it.”¹⁶³ Due to the complexity of issues concerning foreign

¹⁵⁶ *Id.*

¹⁵⁷ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 727 (1976) (White J., dissenting).

¹⁵⁸ See Bazylar, *supra* note 110, at 341; see also Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?* 106 HARV. L. REV. 1980, 2002 (1993) (reviewing Thomas M. Frank, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992)); Thomas R. Sutcliffe, “*The Nile Reconstituted*”: *Executive Statements, International Human Rights Litigation, and the Political Question Doctrine*, 89 B.U. L. REV. 295, 327 (2009).

¹⁵⁹ Daniel C. K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397, 438 (1987).

¹⁶⁰ See *supra* note 102 and accompanying text.

¹⁶¹ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁶² See Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* 9 (1964).

¹⁶³ *Baker v. Carr*, 369 U.S. at 217.

affairs, the executive branch may be better equipped to resolve multiple cases or controversies at once through diplomacy.¹⁶⁴

3. “the impossibility of deciding without an initial policy determination of a kind clearly for [non-judicial] discretion.”¹⁶⁵ This factor seems vague, but it is integral to both the political question doctrine and the act of state doctrine: whether there is a policy rationale that would favor judicial restraint concerning issues with implications for foreign affairs.¹⁶⁶

4. “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.”¹⁶⁷ This factor is linked to the lack of a judicially discoverable standards factor; because the executive branch is better suited for resolving disputes concerning foreign affairs, that branch should handle such disputes.¹⁶⁸

5. “an unusual need for unquestioning adherence to a political decision already made.”¹⁶⁹ The act of state doctrine concerns the political decisions of another country.¹⁷⁰ The United States could have taken a position on those decisions, but that is not necessarily the case.

6. “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”¹⁷¹ This is the factor that has often been quoted when applying both the act of state doctrine and the political question doctrine, and again, this factor involves policy considerations.¹⁷²

The justifications for the political question doctrine as applied to foreign affairs are based on considerations of separation of powers and the need for the nation to speak with one voice on certain matters regarding foreign affairs.¹⁷³ The justifications for the act of state doc-

¹⁶⁴ See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 558-59 (E.D.N.Y. 2008) (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918)); see also Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* 9 (1964).

¹⁶⁵ *Baker v. Carr*, 369 U.S. at 217.

¹⁶⁶ See *supra* note 98 and accompanying text.

¹⁶⁷ *Baker v. Carr*, 369 U.S. at 217.

¹⁶⁸ See *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 558-59 (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918)); see also RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 9 (1964).

¹⁶⁹ *Baker v. Carr*, 369 U.S. at 217.

¹⁷⁰ See *supra* note 52 and accompanying text.

¹⁷¹ *Baker v. Carr*, 369 U.S. at 217.

¹⁷² See *supra* notes 29, 98 and accompanying text.

¹⁷³ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302; see also *Baker v. Carr*, 369 U.S. at 212 n.31. “The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative [branches] . . . and the

trine are also based on questions of separation of powers and the need for the nation to speak with one voice in certain matters concerning foreign affairs.¹⁷⁴ Hence, both doctrines are supported by notions of separation of powers and the need for the nation to speak with one voice in certain matters concerning foreign affairs.¹⁷⁵ Both doctrines are discretionary, in the sense that they do not apply to all questions concerning foreign affairs, but only to those that the courts consider committed to the other political branches.¹⁷⁶

The act of state doctrine fits both the classical and the prudential theories of the political question doctrine.¹⁷⁷ Under the classical theory, certain issues concerning foreign relations have been constitutionally committed to the executive or the legislative powers.¹⁷⁸ Under the prudential theory, it is considered better to leave certain issues concerning foreign relations to the executive or legislative powers.¹⁷⁹

B. *Existence and Scope of the Political Question Doctrine*

The political question doctrine is broad.¹⁸⁰ According to Henkin, the political question doctrine encompasses several doctrines. Henkin maintains that the doctrine is an illusion that masks the following principles listed below:

1. The courts are bound to accept decisions by the political branches within their constitutional authority.
2. The courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any.
3. Not all constitutional limitations or prohibitions imply rights and standing to object in favor of private parties.
4. The courts may refuse some (or all) remedies for want of equity.
5. In principle, finally, there might be constitutional provisions which can properly be interpreted as wholly or in part "self-monitoring" and not the subject of judicial review.¹⁸¹

propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

¹⁷⁴ See *supra* notes 96-104 and accompanying text.

¹⁷⁵ See *supra* notes 28-29, 58-65 and accompanying text.

¹⁷⁶ See *id.*

¹⁷⁷ See *supra* notes 38-45 and accompanying text.

¹⁷⁸ See *supra* note 38 and accompanying text.

¹⁷⁹ See *supra* note 40-41 and accompanying text.

¹⁸⁰ See Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1397 (1995).

¹⁸¹ Henkin, *supra* note 33, at 622-23.

The aforementioned principles may have all predated and could all be included in what is now the political question doctrine.¹⁸² However, it would be more complicated to recognize and apply these principles by themselves on a case-by-case basis than to apply the political question doctrine as it is applied now.¹⁸³

Redish¹⁸⁴ maintained that *Korematsu v. United States*¹⁸⁵ was decided as if *Korematsu* involved a political question issue, even when the Court did not state so expressly.¹⁸⁶ Unlike Henkin's conclusion,¹⁸⁷ this does not mean that the political question doctrine does not exist; instead it indicates that the political question doctrine constitutes a broad umbrella under which several theories based on the separation of powers, constitutional structure, and the need of the executive to act unilaterally can be applied with one name.

The view of the political question doctrine as a structure under which several theories can be applied is beneficial because this view does not constrain it to the doctrines that are currently applied under the doctrine's name, but instead provides the courts with flexibility regarding the application of the political question doctrine to cases. Courts would be able to expand the application of the political question doctrine and include more doctrines under its umbrella, provided that there is a constitutional commitment of a power to a political branch.

These similarities should not lead us, as it has led others,¹⁸⁸ to conclude that the act of state doctrine should not exist. Instead, it would be more practical to apply the act of state doctrine as a part of the political question doctrine.¹⁸⁹ Whenever the courts find an issue that they believe should not be decided by the judiciary because it is within the domain of the executive or the legislative powers, the court would only need to refuse to adjudicate the issue under the political question doctrine, which would include the act of state doctrine.

¹⁸² *See id.*

¹⁸³ *See supra* notes 116-39 and accompanying text.

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¹⁸⁵ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁸⁶ Redish, *supra* note 25, at 1039.

¹⁸⁷ *See Henkin, supra* note 33.

¹⁸⁸ *See Bazzyler, supra* note 110, at 330-31 nn.22-25.

¹⁸⁹ *See Henkin, supra* note 33.

C. *Why Abolishing the Act of State Doctrine Would Not Work*

Michael Bazylar has suggested eliminating the act of state doctrine and using the political question doctrine instead.¹⁹⁰ Thomas Sutcliffe has suggested integrating the act of state doctrine into a broader analysis¹⁹¹ without exactly describing what that analysis would be. These proposals would result in more confusion and could lead the courts to decide cases in which a foreign sovereign has acted within its own territory, thus interfering with foreign affairs policy.¹⁹² Therefore, it would be more pragmatic to clarify the application of the act of state doctrine than to abolish it.¹⁹³

D. *Recent Issues Concerning the Political Question Doctrine and the Act of State Doctrine in Foreign Affairs*

In recent cases, both theories have been invoked at the same time, and in most cases, both theories were rejected by the courts for similar reasons.¹⁹⁴ Recent cases analyzing the application of the act of state doctrine are consistent with treating the act of state doctrine as a part of the political question doctrine.¹⁹⁵

Most of those cases refer to the similarities of both doctrines which arise in the application of, classification of, and grounds for both doctrines.¹⁹⁶ Issues include whether the act of state doctrine is a rule of decision, a jurisdictional rule, or a justiciability issue.¹⁹⁷ Another issue is whether a court must ascertain the foreign policy of the execu-

¹⁹⁰ See Bazylar, *supra* note 110, at 341.

¹⁹¹ See Thomas R. Sutcliffe, "The Nile Reconstituted": *Executive Statements, International Human Rights Litigation, and the Political Question Doctrine*, 89 B.U. L. REV. 295, 327 (2009).

¹⁹² Andrew D. Patterson, *The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine are Wrong*, 15 U.C. DAVIS J. INT'L L. & POL'Y 111, 113, 154-55 (2008).

¹⁹³ *Id.* at 155.

¹⁹⁴ See *supra* notes 116-39 and accompanying text.

¹⁹⁵ *Id.*

¹⁹⁶ See *Sharon v. Time, Inc.*, 599 F. Supp. 538, 548 (1984); *United Bank, Ltd. v. Cosmic International, Inc.*, 392 F. Supp. 262, 269 (1975); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (2003); Transcript of Oral Argument at 13-14, *Dole*, 538 U.S. 468 (2003) (No. 01-593).

¹⁹⁷ See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 825 n.1 (2008) (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422(2007)); *In re Yukos Oil Co. Sec. Litig.*, 2006 U.S. Dist. LEXIS 78067, at *22 n.3 (S.D.N.Y. Oct. 25, 2006); see also *Rep. of Aus. v. Altmann*, 541 U.S. 677, 700-01 (2004); *Nocula v. UGS Corp.*, 520 F.3d 719, 728 (2008); *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 558-59 (E.D.N.Y. 2008).

tive branch before applying the act of state doctrine.¹⁹⁸ Rather than debate which doctrine should apply¹⁹⁹ or suggest a doctrine that counsel did not argue to the court,²⁰⁰ courts could analyze both the act of state doctrine and the political question doctrine at the same time.²⁰¹

As recent cases analyze the act of state doctrine and the political question doctrine simultaneously, and the methodological difficulties appear to be in distinguishing each doctrine, it would simplify the application of the doctrines to analyze them together.²⁰² Since the political question doctrine is broader than the act of state doctrine, the political question doctrine should encompass the act of state doctrine.²⁰³

E. Solving an Erie Problem

Moreover, applying the act of state doctrine as part of the political question doctrine could solve the uncertainty concerning the *Erie* problem²⁰⁴ by interpreting the act of state doctrine as a justiciability issue, and therefore a procedural issue. Under the *Erie* doctrine, the forum non conveniens doctrine has been found to be procedural.²⁰⁵ Similarly, justiciability standards are procedural for the purposes of the *Erie* doctrine.²⁰⁶ Therefore, because the political question doctrine is not to be governed by state law under the *Erie* doctrine, if the act of state doctrine was applicable under the political question doctrine, there would be no doubt as to its validity after *Erie*.²⁰⁷

V. PROPOSAL

This article's proposal is that courts in the United States should apply the act of state doctrine as part of the political question doctrine. Courts are considering the political question doctrine and the act of state doctrine at the same time, as justiciability issues. Whenever the courts find an issue that they believe should not be de-

¹⁹⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 U.S. Dist. LEXIS 18399, at *22 n.9 (2005) (citing *Sarei*, at 1181-82).

¹⁹⁹ *See supra* notes 116-139 and accompanying text.

²⁰⁰ *See supra* notes 117-119 and accompanying text.

²⁰¹ *See infra* notes 208-13 and accompanying text.

²⁰² *See id.*

²⁰³ *See Jules Lobel, Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1397 (1995).

²⁰⁴ *See supra* notes 66-75 and accompanying text.

²⁰⁵ *See Gilbert v. Gulf Oil Corp.*, 153 F.2d 883, 887 (1946); *Shulman v. Compagnie Generale Transatlantique*, 152 F. Supp. 833, 835 (1957); *Ultra Sucro Co. v. Il. Water Treatment Co.*, 146 F. Supp. 393, 396-97 (1956).

²⁰⁶ Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595, 633 (2008).

²⁰⁷ *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

cided by the judiciary because it is within the domain of the executive or legislative powers, the court would only need to refuse to adjudicate under the political question doctrine, which would include the act of state doctrine. This would simplify the application of justiciability doctrines.

When handling a case involving foreign affairs, the attorneys presenting and the judge deciding the issue should ask themselves the following preliminary questions: 1. Has the power implicated in this particular case been constitutionally committed to the executive or legislative branches of government, in that if a judge decides this case, the reasoning or outcome of the case would interfere with the separation of powers structure that is inherent in the Constitution?²⁰⁸ 2. Is there a need for the country to speak with one voice on this issue? 3. Has a foreign sovereign acted within its own territory?

If the answer to the first two questions is yes, then the application of political question doctrine should be considered. If all three questions are answered in the affirmative, then both the political question doctrine and the act of state doctrine are applicable, and both should be considered together.

Furthermore, the third question can be replaced by different questions for other kinds of cases concerning foreign affairs, thus providing courts with the flexibility to add new categories under the political question umbrella. For example, the third question could be: Does this case involve the writ of habeas corpus?²⁰⁹ If so, then according to *Boumediene v. Bush*²¹⁰ this case does not involve a political question.²¹¹ In cases concerning antitrust issues wherein the effects doctrine²¹² would apply, the third question could be: Would there be a direct and substantial effect on U.S. commerce?²¹³

VI. CONCLUSION

After examining the justifications and applications of the political question doctrine in cases involving foreign affairs, this article

²⁰⁸ See THE FEDERALIST NO. 47 (James Madison).

²⁰⁹ Habeas corpus is a writ used to bring a person before a court in order to ensure that a person's detention or imprisonment is not illegal. BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

²¹⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

²¹¹ See David Jenkins, *Habeas Corpus and Extraterritorial Jurisdiction After Boumediene: Towards a Doctrine of "Effective Control" in the United States*, 9 HUM. RTS. L. REV. 306, 319-20 (2009).

²¹² The effects doctrine allows courts in the United States to apply antitrust laws when the acts involved have effects in the United States. See *Timberlane Lumber Co. v. Bank of America, Nat'l Trust & Savings Ass'n.* 549 F.2d 597, 610 (1976).

²¹³ *Id.*

concludes that the act of state doctrine should be a subcategory of the political question doctrine. This article's proposal of a framework can be applied to cases involving political questions in foreign affairs, which may help simplify the complex judicial decisions inherent in these cases.