

Although the further integration of law and technology may in some instances expedite court access, it may also result in an ineffectual court system, in which individuals gain speedier entrance, but fewer receive the opportunity to be heard in a meaningful manner. Although the costs are currently being borne by those who cannot complain,⁹¹ the development of a jurisprudence that fails to recognize the fundamental difference between in-person and remote proceedings may ultimately affect non-citizens and citizens alike in their respective pursuits of justice.

V. THE POLITICAL QUESTION DOCTRINE, EXECUTIVE DEFERENCE, AND FOREIGN RELATIONS

With the globalization of the American economy, the increasing legal recognition of human rights, and the expansion of the War on Terror has come increased attention to lawsuits filed in the United States that might affect American policy abroad. Courts recognize their comparative disadvantage vis-à-vis the executive branch in conducting foreign relations¹ and have successfully² erected a number of common law roadblocks meant to prevent hearing these suits on their merits.³ Among these roadblocks, the political question doctrine has broadened beyond its traditional limits to assume a more prominent position in recent years, as courts struggle to come to terms with a pair of oblique suggestions from the Supreme Court's 2003 Term. Many courts have

Supreme Court, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.) (doubting that videoconferencing's "[v]irtual confrontation . . . is sufficient to protect real [rights]").

⁹¹ Cf. Poulin, *supra* note 13, at 1093 (recognizing that the costs of videoconferencing in criminal trials are primarily shouldered by indigent defendants, who lack the resources to challenge videoconferencing policy).

¹ See, e.g., *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) ("[C]ourts are fundamentally under-equipped to formulate national policies or develop standards for matters not legal in nature . . ." (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)) (internal quotation mark omitted)).

² It is difficult to measure "success" in keeping suits that will affect foreign relations out of court precisely because, as this Part shows, it is difficult to describe a priori which suits they are. Nevertheless, one category that might well be implicated is that of suits brought by foreign plaintiffs against domestic defendants in federal courts, and fewer of these reach judgment today than did twenty years ago. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 461 tbl.3, 462 tbl.4 (2007) (noting that 2592 of 7122, or 36.4%, of such claims reached judgment in 1986, compared with only 113 of 1101, or 10.3%, in 2005). Professors Clermont and Eisenberg ascribe the difference to an increase in the rates of dismissal and settlement. *Id.* at 462–63. (The evident decline in the absolute number of judgments largely reflects extraneous factors such as changes in the Department of Justice's own taxonomy. See Kevin M. Clermont & Theodore Eisenberg, Commentary, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1124 n.15 (1996).)

³ See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 39–137 (2d ed. 2006) (describing, among other concepts, the political question doctrine, foreign sovereign immunity, the act of state doctrine, standing, ripeness, and mootness).

seemingly taken the Court's references to "deference" in *Republic of Austria v. Altmann*⁴ and *Sosa v. Alvarez-Machain*⁵ as invitations to defer to the executive branch's opinions on justiciability.⁶ Unfortunately, this Part argues, this expansion of the political question doctrine's scope goes beyond its purposes; in misapplying the doctrine, the judiciary ironically abdicates its own constitutional role in the name of protecting the separation of powers.⁷ At the same time, expanding the application of the political question doctrine means expanding the set of cases the courts cannot hear, reducing claimants' access to the courts.⁸ This Part first describes the doctrine's expansion as seen in a number of recent decisions. It then suggests two remedies: first, that courts return to the political question doctrine as it was originally conceived; and second, that they apply an international comity analysis to any claim that appears likely to impact foreign relations. Taken together, these changes should vindicate more rights by providing more plaintiffs with access to a competent court (be it American or foreign) while maintaining courts' flexibility to avoid hearing the most dangerous cases.

A. Baker's *Limited Doctrine*

At its most basic, the political question doctrine forbids the federal courts from hearing cases that would require them to rule on matters not fit for judicial determination. It traces its roots to *Marbury v.*

⁴ 541 U.S. 677 (2004).

⁵ 542 U.S. 692 (2004).

⁶ To be clear, every political question dismissal is an act of deference to the political branches on the political issue presented in the plaintiff's claim. That deference is "substantive"; in contrast, this Part discusses "*procedural*" deference, under which courts fail to evaluate the Executive's stated interest in the first place. When this occurs, courts essentially defer entirely on the issue of whether a question is political. Cf. Recent Case, 121 HARV. L. REV. 898, 902 & n.39 (2008) (arguing that the dissent's theory in *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), was overly broad).

⁷ See, e.g., *Lane v. Halliburton*, 529 F.3d 548, 559 (5th Cir. 2008) ("[T]he purpose of the political question doctrine is to bar claims that have the potential to undermine the separation-of-powers design of our federal government.").

⁸ This Part uses "access to the courts" to mean the availability of a legitimate forum in which one may test claims for violations of one's rights. In this sense, the principle lies in the background of every society ruled by law. See The Rt. Hon. Lord Bingham of Cornhill, Senior Law Lord, Sixth Sir David Williams Lecture: The Rule of Law (Nov. 16, 2006) (transcript available at http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php) (describing as an "obvious corollary" to the rule of law "that people should be able, in the last resort, to go to court to have their rights and liabilities determined"). For an interesting argument that the political question doctrine as applied to foreign plaintiffs may violate the guarantee of access to the courts granted by the International Covenant on Civil and Political Rights (ICCPR) (but recognizing that United States courts have held the ICCPR to be without domestic effect), see Posting of Tobias Thienel to The Core, <http://corelaw.blogspot.com/2006/06/political-question-doctrine-in.html> (June 12, 2006, 13:54).

Madison,⁹ but the Supreme Court announced the doctrine's modern contours in 1962 in *Baker v. Carr*.¹⁰ *Baker* described six factors to weigh in considering justiciability:

Prominent on the surface of any case held to involve a political question is found [1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2.] a lack of judicially discoverable and manageable standards for resolving it; or [3.] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4.] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5.] an unusual need for unquestioning adherence to a political decision already made; or [6.] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹¹

Two points about the *Baker* framework are crucial. First, the Court set out its six clauses as individually sufficient and collectively necessary to render a given claim a nonjusticiable political question.¹² In its foreign relations jurisprudence following the decision, the Supreme Court has clarified these categories¹³ but never increased their number.¹⁴ Second, although it might seem unremarkable, the Court in *Baker* not only handed down six factors, it also applied them to the case's facts.¹⁵ It has done the same in the few foreign relations cases that have reached it since: even when concurring with the Executive that a given suit poses a nonjusticiable political question, the Court has never actually deferred to the Executive's judgment on that issue outright. Instead, it has always measured for itself the specific claims against the specific categories.¹⁶ In the years following *Baker*, lower

⁹ 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). The Court held that President Jefferson's decision to withhold Marbury's commission was reviewable before it (more famously) concluded that the statute upon which the plaintiff rested his claim of jurisdiction was nevertheless unconstitutional. *See id.* at 171.

¹⁰ 369 U.S. 186 (1962).

¹¹ *Id.* at 217.

¹² *Id.* ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.")

¹³ *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (citing *Baker*, 369 U.S. 186, for the proposition that the interpretation of treaties is not a political question).

¹⁴ *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (plurality opinion).

¹⁵ *Baker*, 369 U.S. at 226–27.

¹⁶ *See, e.g., Japan Whaling Ass'n*, 478 U.S. at 229–30; *Goldwater v. Carter*, 444 U.S. 996, 996–1002 (1979) (Powell, J., concurring) (finding no political question after reviewing each of the *Baker* factors); *cf., e.g., Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995) ("[E]ven an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication . . ."). As to foreign relations questions specifically, the *Baker* Court itself favored a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in

courts largely adhered to this carefully circumscribed conception of the doctrine (hereinafter called the “limited political question doctrine”) and eventually allowed the doctrine’s use to diminish.¹⁷

In 2004, however, the Supreme Court issued two opinions that have spurred some courts to award the Executive greater deference in the foreign relations sphere. The first, *Republic of Austria v. Altmann*, noted in dicta that the State Department’s opinion on the policy effects of exercising jurisdiction over particular claims against foreign sovereigns “might well be entitled to deference.”¹⁸ Three weeks later, the Court issued a second opinion, *Sosa v. Alvarez-Machain*, which observed in a widely analyzed footnote that “case-specific deference” might be appropriate in evaluating claims for violations of customary international law.¹⁹ Although neither *Altmann* nor *Sosa* applied the political question doctrine itself, courts in the four years since have frequently looked to it as a vessel for this increased deference. Not surprisingly, this has increased the doctrine’s use dramatically.²⁰

B. Squeezing Deference into Baker: Expanding the Doctrine

The courts that have expanded the political question doctrine have done so nominally within the bounds of *Baker*’s categories, particularly favoring the last three.²¹ However, they have looked to these categories almost as an afterthought; in each of the decisions presented below, the real actuating force was a State Department determination that the suit in question should not proceed. Naturally, this has yielded awkward fits between fact and doctrine, as the *Baker* inquiry is dramatically relaxed to accommodate the deference granted to the executive branch.

the light of its nature and posture in the specific case, and of the possible consequences of judicial action.” *Baker*, 369 U.S. at 211–12.

¹⁷ See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267 n.158 (2002); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1427–28 (1999); see also HOWARD P. FINK & MARK V. TUSHNET, FEDERAL JURISDICTION 231 (2d ed. 1987) (“[W]hen the political questions doctrine fell into desuetude after *Baker v. Carr*, it was replaced as an avoidance device by the standing doctrine.”).

¹⁸ 541 U.S. 677, 702 (2004).

¹⁹ 542 U.S. 692, 733 n.21 (2004).

²⁰ See *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) (“[T]he judiciary properly defers to the political branches in *most* [cases touching foreign relations]” (emphasis added)); see also *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 519 (S.D.N.Y. 2006) (generalizing that cases in which foreign plaintiffs sue domestic corporations for violations of international law are, “[f]or the most part,” political questions).

²¹ Although each of *Baker*’s categories is sufficient to render a claim nonjusticiable, they “are probably listed in descending order of both importance and certainty.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion).

1. “*Respect Due.*” — The Third Circuit presented a straightforward example of this tendency when it deferred to the Executive’s opinion that a number of claims met *Baker’s* fourth prong in *In re Nazi Era Cases Against German Defendants Litigation*.²² In *Nazi Era Cases*, plaintiff Simon Rozenkier asked the court to hear common law claims against two German corporations that he alleged had aided the Nazi government in conducting barbarous medical experiments on him.²³ At trial, the defendants had won dismissal on the ground that Rozenkier’s claims were precluded by his previous participation in a claims tribunal established by the United States and German governments.²⁴ The appellate court found dispositive that agreement’s declaration that it represented the culmination of the Executive’s efforts at resolving claims against the erstwhile German government.²⁵ Thus, it determined that the government’s statement of interest reflected a policy decision. Precisely because the Executive had undertaken many years’ efforts to reach an objective, the Third Circuit reasoned, a suit that sought to sidestep the final phase of that undertaking would impermissibly disrespect it.²⁶ In so holding, the court seemed to accede to the Executive’s claim that the latter could grant itself the power to determine which cases the judicial branch may hear so long as a party to the relevant executive agreement agrees.²⁷

2. “*Unquestioning Adherence.*” — At first blush, *Baker’s* fifth factor would seem to provide the most straightforward way to defer to the Executive’s judgment on whether a claim should be heard. Yet “unquestioning adherence” dismissals are rarely seen in the wild. The United States District Court for the Central District of California used the prong, however, when it dismissed *Mujica v. Occidental Petroleum Corp.*,²⁸ an Alien Tort Statute case brought against an American corporation alleged to have conspired with the Colombian military to

²² 196 F. App’x 93 (3d Cir. 2006).

²³ See *id.* at 94, 96.

²⁴ *Id.* at 95–96. Per the terms of the executive agreement that created the tribunal, the State Department submitted a “statement of interest” in the suit recommending dismissal. *Id.*

²⁵ *Id.* at 98 (citing Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.–F.R.G., pmbl., July 17, 2000, 39 I.L.M. 1298).

²⁶ See *id.* at 99. The Second Circuit ruled similarly a year earlier in *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57 (2d Cir. 2005), which presented claims resulting from Austria’s expropriation of Jewish assets during the Second World War, *id.* at 60. In this case, as in *Nazi Era Cases*, the United States had recently concluded an executive agreement with the targeted country meant to resolve claims arising from its involvement in the Holocaust. See *id.* at 65. Like the Foundation in *Nazi Era Cases*, the General Settlement Fund did not itself require dismissal, but rather mandated that the State Department submit a statement of interest to that end. See *id.* at 59. On appeal, the Second Circuit expressly deferred to the Executive’s stated interests, concerned that hearing the claim would violate *Baker’s* fourth, “respect due” test. See *id.* at 72–73.

²⁷ Because the United States and Germany established the tribunal with an executive agreement rather than a treaty, the legislature’s opinion was not heard on the matter.

²⁸ 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

bomb a village. In that case, the State Department filed a statement of interest indicating that the United States opposed the litigation based on its potential to harm American policy regarding the bombing.²⁹ The court rolled its analysis of the fifth factor into its analysis of the fourth, “respect due” factor and concluded that the Executive’s preference for resolving the issue diplomatically rather than legally was sufficient to dispose of the matter.³⁰ Certainly, this finding met part of *Baker*’s fifth factor, in that the Executive’s official statement was a “political decision.” The court neglected the remaining two parts, however: first, it did not consider the existence *vel non* of “an unusual need for unquestioning adherence” to that decision at all. Other courts have been much stricter in determining whether an “unusual need” is present.³¹ Second, the court also glossed over *Baker*’s statement that the decision be “already made.” In fact, eleven months after the plaintiffs filed their suit, the State Department represented “that it did not yet have a position on the foreign policy implications of [the] case.”³² Only after eight more months did the Department file its second statement, urging dismissal.³³

3. “*Potentiality of Embarrassment.*” — Finally, executive interest statements similar to those in the cases mentioned above have also prompted political question dismissals based on *Baker*’s sixth test. The Ninth Circuit evinced this approach in affirming the dismissal of *Corrie v. Caterpillar, Inc.*,³⁴ a suit brought by the families of an American and several Palestinians injured or killed by bulldozers operated by the Israel Defense Force in the Gaza Strip.³⁵ The court found one fact decisive: that the United States had funded the defendant’s sale of bulldozers to Israel.³⁶ Second-guessing the Executive’s conclusion “that Israel should purchase Caterpillar bulldozers,” the court held, could disrupt United States efforts in the Middle East.³⁷ A court in

²⁹ *Id.* at 1169, 1194.

³⁰ *Id.* at 1194 n.25. Citing *Sosa*, the court declined to scrutinize the Executive’s statement because the issue related to foreign policy (although it was not “a ‘pure issue’” thereof). *See id.* at 1194 & n.24.

³¹ *See, e.g.*, *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 390 (3d Cir. 2006) (“As *Baker* makes clear, the fifth factor contemplates cases of an ‘emergency[] nature’ that require ‘finality in the political determination,’ such as the cessation of armed conflict.” (quoting *Baker*, 369 U.S. at 213–14) (alteration in original)).

³² *Mujica*, 381 F. Supp. 2d at 1169.

³³ *See id.*

³⁴ 503 F.3d 974 (9th Cir. 2007).

³⁵ *Id.* at 977.

³⁶ *Id.* at 982. Though the United States did not file a statement of interest as such, *see id.* at 978 n.3, it introduced information about its funding and policy interests in an appellate amicus brief, in which the Ninth Circuit took “considerable interest,” *id.* (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)) (internal quotation marks omitted).

³⁷ *See id.* at 983–84.

the Southern District of New York ruled similarly in *Matar v. Dichter*,³⁸ in which a putative class challenged an Israeli security action that killed a number of Palestinians in Gaza. There again, the State Department filed a statement urging a dismissal on political question grounds,³⁹ and the court in fact dismissed, basing its ruling on the risk of embarrassment inherent in second-guessing the State Department's classification of Israel as a United States ally.⁴⁰ Neither court particularly traced the chain of logic by which hearing the case in question would foster "embarrassment"; instead they merely followed the State Department's advice that it would.

4. *Restoring the "Limited" Doctrine.* — All of the *Baker* categories mentioned above invoke separation of powers concerns, and there can be no doubt that the Constitution places primary power to conduct foreign relations in the executive branch.⁴¹ Nevertheless, the Constitution grants unreviewable authority only in tightly defined areas — never for the entire swath of "foreign relations."⁴² In the absence of extenuating circumstances, litigation that carries the simple possibility (or probability, or even certainty) of impeding one of the Executive's international relations interests is no less justiciable than litigation that might impede, say, one of its domestic regulatory interests. Because both the Constitution and Congress can constrain the Executive's pursuit of its interests, the judiciary must be ready to judge those interests if it aims to act as a meaningful check on the Executive's power.⁴³ Even if the Executive was right in urging dismissal in each of these claims, the judiciary has been untrue to the political question doc-

³⁸ 500 F. Supp. 2d 284 (S.D.N.Y. 2007).

³⁹ *Id.* at 287.

⁴⁰ *See id.* at 294–96. The court distinguished three cases brought against Palestinian organizations and one brought by Israeli Defense Minister Ariel Sharon against an American corporation (all of which proceeded to a judgment on the merits) as not having been brought against a sovereign or an ally. *See id.* at 295.

⁴¹ *See, e.g.,* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations . . .").

⁴² *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). Where Congress shares foreign relations powers, it has likewise carefully delineated the Executive's areas of unreviewable authority. *See, e.g.,* 22 U.S.C. § 1631a(c) (2006) ("The determination . . . that any vested property was not directly owned [for purposes of liquidation, after the property was seized from Bulgarian, Hungarian, or Romanian nationals during World War II] shall be within the sole discretion of the President . . . and shall not be subject to review by any court."); *id.* § 6723(b)(3)(B) ("Any objection by the President to an individual serving as an inspector [for purposes of the Chemical Weapons Convention] . . . shall not be reviewable in any court.").

⁴³ *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 *passim* (2007) (arguing against deference for Executive acts that fall within the "executive-constraining zone" of federal law). *See generally* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 95–105 (1987) (defending the judiciary's role as "final arbiter" of the structural Constitution).

trine's purpose by so readily acceding to the Executive's views. As Justice Frankfurter famously warned, although "[t]he accretion of dangerous power does not come in a day," it may nevertheless develop gradually where the Constitution's strictures are not enforced.⁴⁴

The separation of powers problem has a second aspect: by deferring to the Executive on the question of which suits it will hear, the judiciary is entrusting to the Executive its own duty to recognize violations of individuals' rights. *Marbury v. Madison* distinguished political questions as such, which the courts could not hear, from those involving individual rights, which they emphatically *should*.⁴⁵ The distinction is intuitively sound — no one would doubt that courts are expert at remedying individual wrongs, and it is scarcely more controversial to point out that judicial review makes the judiciary a natural agent to protect constitutional guarantees against the tyranny of the majority.⁴⁶ Yet when the courts defer to the State Department's judgment on which cases should be dismissed, they entrust that institution with balancing both foreign relations concerns and access to the courts. There is ample reason for concern about whether the State Department is able to fulfill this duty, however. Besides its mission and culture, which are fundamentally different from those of the courts,⁴⁷ the Department's letters of interest in particular are subject to a level of political pressure (both from the Oval Office and private interests) utterly unknown in the judicial realm.⁴⁸ If courts are unfit to conduct foreign policy, so too are foreign policy experts unfit to vindicate individual rights. When a case implicates both values, allowing one institution to make the decision without the other's input is clearly

⁴⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

⁴⁵ 5 U.S. (1 Cranch) 137, 166 (1803) ("[Political questions] respect the nation, not individual rights But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."). As a matter of legal doctrine, the special protection for individual rights claims survived at least into the *Baker* era, and is not unknown today. See, e.g., *Alvarez-Machain v. United States*, 331 F.3d 604, 614 n.7 (9th Cir. 2003) (en banc) (finding no political question raised by an alien's claim of kidnapping at the hands of United States agents), *rev'd on other grounds sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Halperin v. Kissinger*, 606 F.2d 1192, 1201 n.59 (D.C. Cir. 1979) ("Our duty to decide this [Fourth Amendment claim] is not diminished because we deal with the President's foreign affairs power."), *aff'd by an equally divided Court*, 452 U.S. 713 (1981) (per curiam).

⁴⁶ See CHEMERINSKY, *supra* note 43, at 95–105; Barkow, *supra* note 17, at 240.

⁴⁷ See Carolyn J. Brock, Note, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT'L L. 795, 820 (1990) ("[T]he State Department is biased towards finding that policy considerations outweigh private interests, because the State Department exists to maintain, and improve foreign relations.").

⁴⁸ See Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department "Statements of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 829–35 (2006).

not the solution. Instead, this section argues, the limited political question doctrine lets both the State Department and the courts act in their areas of expertise.

C. *Going Further: International Comity*

It is almost certainly true that, if the limited political question doctrine is restored, as this Part advocates, more cases will proceed to judgment on the merits. Indeed, shifting the balance between foreign policy and access to the courts is the proposal's chief purpose. But what about functional concerns? There is nothing illiberal in observing that full trials for some claims will harm United States interests abroad, and some theories would find that the harm from hearing any or all of the cases cited above outweighed their plaintiffs' interests in having their claim heard in a United States court. If those theories are to be believed, the limited political question doctrine alone permits too many claims into American courts. Fortunately, however, the American judiciary is frequently not a plaintiff's only choice. The remainder of this Part briefly describes the doctrine of international comity, by which courts may dismiss a claim in deference to another state's interest in resolving it. It concludes by advocating that comity be applied as a first-level filter, before political question analysis, for two important reasons.

Comity among nations as a concept predates even *Marbury's* prohibition on deciding political questions. The Western law of nations first encountered the idea of respect among sovereigns in the work of the great seventeenth-century Dutch jurists,⁴⁹ and the principle (if not the modern doctrine) was incorporated into American law in 1797.⁵⁰ In American foreign relations law, the principle is given content by a balancing test that considers "the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum."⁵¹ The analysis self-consciously resembles that used for *forum non conveniens*: courts consider both potential fo-

⁴⁹ See Hessel E. Yntema, *The Comity Doctrine*, in 2 VOM DEUTSCHEN ZUM EUROPÄISCHEN RECHT 65 (von Caemmerer, Nikisch & Zweigert eds., 1962), *reprinted in* 65 MICH. L. REV. 9, 19–28 (1966).

⁵⁰ See Kurt H. Nadelmann, *Introduction*, 65 MICH. L. REV. 1, 3 (1966) (tracing the principle's American adoption to *Emory v. Grenough*, 3 U.S. (3 Dall.) 369 (1797)). The classic formulation comes from 1895:

[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to *international duty and convenience*, and to the *rights of its own citizens or of other persons who are under the protection of its laws*.

Hilton v. Guyot, 159 U.S. 113, 164 (1895).

⁵¹ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

rum states' relative interests in resolving the suit, as well as the adequacy of the alternative forum.⁵²

This focus gives comity two chief advantages over the expanded political question doctrine. First, it is important to assess not only how *many* suits are dismissed under a competing doctrine, but also what *kinds* are likely to be dismissed. Comity dismisses only those suits whose plaintiffs have an adequate alternative forum in which to press their claim.⁵³ Therefore, it acts as a ratchet, never permitting plaintiffs' access to the courts to decrease. At the same time, it furthers a baseline foreign policy with the alternative forum state.⁵⁴ Thus, the combination of comity and limited political question doctrine avoids one of the disadvantages of the expanded doctrine (namely, its overbroad restriction on access to the courts) while to some extent upholding its chief advantage (sensitivity to foreign policy concerns).

Second, comity is a more flexible filter than the expanded political question doctrine. Many suits barred by the political question doctrine may not be heard by federal courts because they fall outside of the Constitution's "case or controversy" requirement.⁵⁵ This is especially common among cases from foreign affairs, which can present parties, causes of action, and prayers for relief that resemble nothing else on a court's docket. Thus, finding a political question often means finding that the court lacks subject matter jurisdiction. For the same reasons

⁵² *Id.* at 1238–39.

⁵³ Importantly, however, a comity dismissal does not require that the alternative forum provide an actual remedy. *Id.* at 1239–40; *cf.* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (permitting *forum non conveniens* dismissal despite the probability of a different remedy under the alternative forum's law). The petitioner in *Ungaro-Benages* pressed her claim in federal court, after all, because she recognized that the Foundation tribunal effectively barred it. Comity dismissals in these cases are nevertheless justifiable on two grounds. First, access to the courts carries philosophic and concrete value separate from any recovery it may generate. *See* Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review* 32 (Hebrew Univ. of Jerusalem Ctr. for the Study of Rationality, Discussion Paper No. 489, 2008); *cf.* KENNETH FEINBERG, WHAT IS LIFE WORTH? 79 (2005) ("The right to a hearing made the [September 11 Victim Compensation] Fund more personal, more friendly, and more attuned to the needs of the 9/11 families."). Second, in most such cases, the decision on the part of the forum state (or, in *Ungaro-Benages*, the forum states, acting jointly through their agreement) to deny a remedy represents part of a deliberate and legitimate public policy. *See, e.g.,* Bi v. Union Carbide Chems. & Plastics Co., 984 F.2d 582, 586 (2d Cir. 1993) (deferring to India's determination of the best way to remedy the Bhopal disaster expressly because it was a legitimate democracy); *cf.* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 532 n.316 (2001) (collecting cases in which courts have made *forum non conveniens* determinations based on the alternative forum state's legitimacy).

⁵⁴ It seems fair to assume that situations in which it is the United States's policy *not* to promote comity with a nation that would otherwise qualify as an adequate alternative will be sufficiently rare that the State Department can give clear reasons for opposing dismissal.

⁵⁵ U.S. CONST. art III, § 2; *see* Barkow, *supra* note 17, at 241.

courts prefer not to interpret the Constitution,⁵⁶ they should prefer not to set these hard limits on their jurisdiction over future cases. Comity, by contrast, does not claim a constitutional pedigree; instead, it lies somewhere between “absolute obligation” and “mere courtesy.”⁵⁷ It thus has more moving parts than a political question analysis; this makes comity precedents easier to distinguish when circumstances change. An example illustrates the point.

When presented with claims arising out of the 1973 Chilean coup in *Schneider v. Kissinger*,⁵⁸ the D.C. Circuit employed the *Baker* framework to conclude that the suit was nonjusticiable. Specifically, it looked to the distribution of externally focused powers within the Constitution, found that most such clauses applied to the political branches, and finally held that this meant that “decision-making in the fields of foreign policy and national security is textually committed to the political branches of government.”⁵⁹ This was enough to find the claims at bar nonjusticiable, of course (per *Baker*’s first factor), but it was a very broad rule as well. When the same court reached *Bancoult v. McNamara*⁶⁰ (presenting tort claims arising out of the construction of a United States military base on the island of Diego Garcia in the Indian Ocean), it ran into *Schneider*’s holding immediately. Despite clear differences between the claims presented and the state interests that hearing them might impede, the court in *Bancoult* had no choice: unless it could find that establishing a military base on Diego Garcia was not a foreign policy decision as such, it would have to rule that the Constitution forbade hearing the case.⁶¹ In *Bancoult*, a dismissal might well have made good sense from the State Department’s perspective, but what about a future foreign relations case in which a hearing would not harm United States policies?⁶² In these situations, courts gain flexibility by using comity instead: it is much easier to find a change in one of the terms of comity analysis (perhaps the United

⁵⁶ See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (describing seven rules under which the Supreme Court will decline to interpret the Constitution).

⁵⁷ *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

⁵⁸ 412 F.3d 190 (D.C. Cir. 2005).

⁵⁹ *Id.* at 194; see *id.* at 194–96.

⁶⁰ 445 F.3d 427 (D.C. Cir. 2006).

⁶¹ *Id.* at 436–37.

⁶² Not every State Department submission urges dismissal, after all. See, e.g., Letter from Michael J. Matheson, Acting Legal Advisor, U.S. Dep’t of State, to Frank W. Hunger, Assistant Atty Gen., U.S. Dep’t of Justice (July 9, 1997), exhibited in *Burma v. Unocal, Inc.*, 176 F.R.D. 329, 361–62 (C.D. Cal. 1997). Arguably, hearing some cases can actually further American foreign policy. See, e.g., Brief of Amici Curiae Career Foreign Service Diplomats in Support of Neither Party at 7–26, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (No. 05-36210), 2006 WL 2952508.

States's interest, or the adequacy of the alternative forum) than in the Constitution itself.⁶³

Because comity is not a jurisdictional limit, but rather a discretionary one, it could not wholly displace political question analyses. A plaintiff for whom no other forum is an adequate alternative might not be able to bring his case in the United States, either — after all, some claims simply cannot be heard in any forum.⁶⁴ Nevertheless, this Part suggests that comity be applied first, as a “filter,” when courts find themselves urged to apply a political question analysis.⁶⁵ This will avoid more suits than the limited political question doctrine alone, of course, but just as importantly it will do so without the separation of powers problems posed by the expanded doctrine. Not least, it will also do so on a case-by-case basis. If the Supreme Court urged anything with its language in *Altmann* and *Sosa*, after all, it was this very kind of attentiveness to the specifics of each petitioner's case.

VI. AESTHETIC INJURIES, ANIMAL RIGHTS, AND ANTHROPOMORPHISM

Over the last forty years, federal law has conferred a wide range of rights on animals. This Part explores one way in which private suits to enforce these rights gain access to federal courts: by alleging that the unlawful treatment of animals is causing “aesthetic injury” to a human plaintiff. This type of suit has long been used to enforce regulatory

⁶³ Had the D.C. Circuit considered comity in *Bancoult*, it would probably have looked to the United Kingdom as an alternative forum. The archipelago in question lies in Britain's sovereign territory, and Britain enjoys joint use of the military base built there. See *Bancoult*, 445 F.3d at 429–30; CENT. INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2008, at 90 (2008). Further, substantially the same set of plaintiffs was at the time embroiled in an appeal on the same issues in the United Kingdom's courts. See *R (on the application of Bancoult) v. Sec'y of State for Foreign & Commonwealth Affairs* [2006] EWHC (Admin) 1038, [2006] A.C.D. 81 (ruling for claimants on the merits less than a month after the D.C. Circuit's decision), *aff'd* [2007] EWCA (Civ) 498, [2008] Q.B. 365, *rev'd*, [2008] UKHL 61. These facts might well have justified deference to the United Kingdom's interest in resolving the matter.

⁶⁴ For example, a suit challenging the legality of the United States's invasion of Iraq could never be heard in a foreign court, but it is also a textbook example of a political question, even under the limited doctrine. Cf. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309–11 (2d Cir. 1973) (ordering dismissal of challenge to bombing of Cambodia). Thus, such a claim cannot be heard at all.

⁶⁵ Traditional civil procedure assumes that jurisdiction must properly lie before a court can rule on any other aspect of a case. Because courts lack subject matter jurisdiction to hear political questions, it might appear that they must reach that question before turning to comity. However, the Supreme Court recently clarified that courts may reach “threshold, nonmerits issue[s]” before deciding whether they have jurisdiction to decide the merits. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1192 (2007). Because comity analyses resemble those of *forum non conveniens*, see *supra* pp. 1201–02, *Sinochem* almost certainly permits comity as well. See Posting of Greg Castanias & Victoria Dorfman to *Opinio Juris*, <http://opiniojuris.org/2007/03/16/preliminary-reflections-on-sinochem/> (Mar. 16, 2007, 12:59).