**Constitutional Law I**

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**Spring 2022**

**Supplemental Reading #6: Political Question Doctrine – *Zivotofsky* and *Rucho***

132 S.Ct. 1421

Supreme Court of the United States

**Menachem Binyamin ZIVOTOFSKY, by his parents and guardians, Ari Z. and Naomi Siegman ZIVOTOFSKY, Petitioner**

**v.**

**Hillary Rodham CLINTON, Secretary of State.**

No. 10–699.

Argued Nov. 7, 2011. Decided March 26, 2012.

Chief Justice ROBERTS delivered the opinion of the Court [in which Justices Scalia, Kennedy, Thomas, Ginsburg, Alito and Kagan joined].

Congress enacted a statute providing that Americans born in Jerusalem may elect to have “Israel” listed as the place of birth on their passports. The State Department declined to follow that law, citing its longstanding policy of not taking a position on the political status of Jerusalem. When sued by an American who invoked the statute, the Secretary of State argued that the courts lacked authority to decide the case because it presented a political question. The Court of Appeals so held.

We disagree. The courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution.

…

**II**

The lower courts concluded that Zivotofsky's claim presents a political question and therefore cannot be adjudicated. We disagree.

In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.  Our precedents have identified a narrow exception to that rule, known as the “political question” doctrine. We have explained that a controversy “involves a political question ... where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.” [*Nixon v. United States,* 506 U.S. 224, 228 (1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993024744&pubNum=0000708&originatingDoc=I417bfda8774111e18b1ac573b20fcfb7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).  In such a case, we have held that a court lacks the authority to decide the dispute before it.

The lower courts ruled that this case involves a political question because deciding Zivotofsky's claim would force the Judicial Branch to interfere with the President's exercise of constitutional power committed to him alone. The District Court understood Zivotofsky to ask the courts to “decide the political status of Jerusalem.”  This misunderstands the issue presented. Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth.

For its part, the D.C. Circuit treated the two questions as one and the same. That court concluded that “[o]nly the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem,” and also to “decide how best to implement that policy.”  Because the Department's passport rule was adopted to implement the President's “exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem,” the validity of that rule was itself a “nonjusticiable political question” that “the Constitution leaves to the Executive alone.”  Indeed, the D.C. Circuit's opinion does not even mention § 214(d) until the fifth of its six paragraphs of analysis, and then only to dismiss it as irrelevant: “That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action ... is of no moment to whether the judiciary has [the] authority to resolve this dispute....”

The existence of a statutory right, however, is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Moreover, because the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional. At least since *Marbury v. Madison,* we have recognized that when an Act of Congress is alleged to conflict with the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”  That duty will sometimes involve the “[r]esolution of litigation challenging the constitutional authority of one of the three branches,” but courts cannot avoid their responsibility merely “because the issues have political implications.” *INS v. Chadha,* 462 U.S. 919, 943 (1983).

In this case, determining the constitutionality of § 214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky's case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President's powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with § 214(d). Either way, the political question doctrine is not implicated. “No policy underlying the political question doctrine suggests that Congress or the Executive ... can decide the constitutionality of a statute; that is a decision for the courts.” [*Id.*, at 941–942](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983129415&pubNum=0000708&originatingDoc=I417bfda8774111e18b1ac573b20fcfb7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

The Secretary contends that “there is a textually demonstrable constitutional commitment” to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. *Nixon,* 506 U.S., at 228. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is aggrandizing its power at the expense of another branch.

Our precedents have also found the political question doctrine implicated when there is “a lack of judicially discoverable and manageable standards for resolving” the question before the court. [*Nixon, supra,* at 228](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993024744&pubNum=0000708&originatingDoc=I417bfda8774111e18b1ac573b20fcfb7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Framing the issue as the lower courts did, in terms of whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns. They dissipate, however, when the issue is recognized to be the more focused one of the constitutionality of § 214(d). Indeed, both sides offer detailed legal arguments regarding whether § 214(d) is constitutional in light of powers committed to the Executive, and whether Congress's own powers with respect to passports must be weighed in analyzing this question.

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**III**

To say that Zivotofsky's claim presents issues the Judiciary is competent to resolve is not to say that reaching a decision in this case is simple. Because the District Court and the D.C. Circuit believed that review was barred by the political question doctrine, we are without the benefit of thorough lower court opinions to guide our analysis of the merits. … Having determined that this case is justiciable, we leave it to the lower courts to consider the merits in the first instance.

The judgment of the Court of Appeals for the D.C. Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

[An opinion of Justice Sotomayor concurring in the judgment is omitted.]

Justice BREYER, dissenting.

… *Baker v. Carr,* 369 U.S. 186 (1962), set forth several categories of legal questions that the Court had previously held to be “political questions” inappropriate for judicial determination. Those categories include (1) instances in which the Constitution clearly commits decisionmaking power to another branch of Government, and (2) issues lacking judicially manageable standards for resolution. They also include (3) issues that courts cannot decide without making “an initial policy determination of a kind clearly for nonjudicial discretion,” (4) issues that a court cannot independently decide “without expressing lack of the respect due coordinate branches of government,” (5) cases in which there is “an unusual need for unquestioning adherence to a political decision already made,” and (6) cases in which there is a potential for “embarrassment from multifarious pronouncements by various departments on one question.” *Ibid.*

… [T]hese categories (and in my view particularly the last four) embody “circumstances in which prudence may counsel against a court's resolution of an issue presented.” …

Four sets of prudential considerations, *taken together,* lead me to that conclusion.

First, the issue before us arises in the field of foreign affairs… The Constitution primarily delegates the foreign affairs powers “to the political departments of the government, Executive and Legislative,” not to the Judiciary.  And that fact is not surprising. Decisionmaking in this area typically is highly political. It is delicate and complex. It often rests upon information readily available to the Executive Branch and to the intelligence committees of Congress, but not readily available to the courts. … And the creation of wise foreign policy typically lies well beyond the experience or professional capacity of a judge. At the same time, where foreign affairs is at issue, the practical need for the United States to speak with one voice and act as one, is particularly important.

The result is a judicial hesitancy to make decisions that have significant foreign policy implications …

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

Third, the countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones. Zivotofsky does not assert the kind of interest, *e.g.,* an interest in property or bodily integrity, which courts have traditionally sought to protect. Nor, importantly, does he assert an interest in vindicating a basic right of the kind that the Constitution grants to individuals and that courts traditionally have protected from invasion by the other branches of Government. … This is not to say that Zivotofsky's claim is unimportant or that the injury is not serious or even that it is purely ideological. It is to point out that those suffering somewhat similar harms have sometimes had to look to the political branches for resolution of relevant legal issues.

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

The upshot is that this case is unusual both in its minimal need for judicial intervention and in its more serious risk that intervention will bring about embarrassment, show lack of respect for the other branches, and potentially disrupt sound foreign policy decisionmaking. For these prudential reasons, I would hold that the political-question doctrine bars further judicial consideration of this case. And I would affirm the Court of Appeals' similar conclusion. …

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**Note on *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019):** This case considered constitutional challenges under (among other provisions) the First and Fourteenth Amendments to so-called “political gerrymandering” – that is, the state legislatures drawing congressional district boundaries to favor a particular political party. Chief Justice Roberts, writing for a five-Justice majority, found this to be a political question (meaning that plaintiffs’ case was dismissed). Some excerpts from a much longer opinion:

Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” We have understood that limitation to mean that federal courts can address only questions historically viewed as capable of resolution through the judicial process. In these cases we are asked to decide an important question of constitutional law. But before we do so, we must find that the question is presented in a “case” or “controversy” that is, in James Madison’s words, “of a Judiciary Nature.”

Chief Justice Marshall famously wrote that it is “the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 1 Cranch 137, 177 (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. In such a case the claim is said to present a “political question” and to be nonjusticiable—outside the courts’ competence and therefore beyond the courts’ jurisdiction. Among the political question cases the Court has identified are those that lack judicially discoverable and manageable standards for resolving them.

…

[P]laintiffs [in this case] inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve— based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. … There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts. Zivotofsky v. Clinton, 566 U. S. 189, 196 (2012).

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is incompatible with democratic principles does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. Judicial action must be governed by standard, by rule, and must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements.

Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, dissented, arguing that courts could identify neutral standards to restrict extreme partisan gerrymanders and emphasizing the great harm to democracy such gerrymanders inflict.