

## ARE FOREIGN AFFAIRS DIFFERENT?

**POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?** By Thomas M. Franck.<sup>1</sup> Princeton: Princeton University Press. 1992. Pp. 159. \$24.95.

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It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

Justice George Sutherland<sup>3</sup>

There is no longer a clear division between what is foreign and what is domestic. The world economy, the world environment, the world AIDS crisis, the world arms race — they affect us all.

President William J. Clinton<sup>4</sup>

Among domestic constitutional scholars, the debate over the political question doctrine reflects a fundamental contest over the legitimacy and scope of judicial review in a democratic society. This debate is a scholarly perennial, echoing over the generations with the voices of Felix Frankfurter<sup>5</sup> and Learned Hand,<sup>6</sup> Herbert Wechsler<sup>7</sup> and Alexander Bickel,<sup>8</sup> Louis Henkin<sup>9</sup> and Jesse Choper.<sup>10</sup> The Supreme Court's recent application of the doctrine to bar review of the impeachment proceedings of Judge Walter Nixon<sup>11</sup> is likely to trigger

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<sup>3</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

<sup>4</sup> President William J. Clinton, *We Force the Spring*, Presidential Inaugural Address (Jan. 20, 1993), in *N.Y. TIMES*, Jan. 21, 1993, at A15.

<sup>5</sup> See Felix Frankfurter, *John Marshall and the Judicial Function*, 69 *HARV. L. REV.* 217, 227-28 (1955).

<sup>6</sup> See *LEARNED HAND, THE BILL OF RIGHTS 15-18* (Atheneum 1979) (1958).

<sup>7</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 7-10 (1959).

<sup>8</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 183-98* (2d ed. 1986).

<sup>9</sup> See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597, 625 (1976); Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 *HARV. L. REV.* 524, 529 (1987).

<sup>10</sup> See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260-379* (1980).

<sup>11</sup> See *Nixon v. United States*, 113 S. Ct. 732, 739-40 (1993).

another round. Among scholars of foreign affairs law, however, the debate over the political question doctrine is actually a conflict about whether judicial review should apply to foreign affairs.

Professor Thomas Frank engages this second debate. *Political Questions, Judicial Answers* is an elegant, erudite, and often passionate argument for extending the rule of law beyond the water's edge. The foundation of this argument is not a claim about the legitimacy of judicial review, but an attack on the deeply embedded perception that foreign affairs are "different." This perception underpins Justice Sutherland's assertion of a plenary Executive foreign affairs power in *United States v. Curtiss-Wright Export Corp.*,<sup>12</sup> a power constitutionally shielded from judicial review.<sup>13</sup> Similar perceptions underlie both prudential and technical arguments for the application of the political question doctrine in foreign affairs cases, arguments premised on the existence of dangers in the wider world that have long since been banished at home.

Franck systematically denies the alleged difference between domestic and foreign affairs in each of the contexts in which it is invoked to justify application of the political question doctrine in foreign affairs cases. To clinch his argument, he points to the German Constitutional Court as an affirmative counterexample of a court that engages in full judicial review of foreign affairs and domestic cases alike. His prescription for U.S. courts reflects the German approach: an absolute duty of judicial review based on the transformation of political questions into "evidentiary" questions. In an era in which all three presidential candidates in the recent campaign sprinkled their debating positions — on everything from health care to transport — with references to the actions of our foreign competitors, Franck has similarly succeeded in injecting a healthy comparative element into constitutional commentary.

On closer examination, however, the "evidentiary" label masks more than it resolves. Franck's approach requires judges affirmatively to decide questions that would otherwise be deemed political questions in the guise of assigning burdens of proof. But a court faced with an issue such as whether military skirmishes in a foreign civil war con-

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<sup>12</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>13</sup> In *Curtiss-Wright*, Justice Sutherland elaborated his personal theory of how the powers that comprise the "external sovereignty" of the United States passed directly from England "to the colonies in their collective and corporate capacity as the United States" and lodged in the Executive. *Id.* at 316-20. A year later, Justice Sutherland expanded on this theory by holding that "the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision." *United States v. Belmont*, 301 U.S. 324, 328 (1937) (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)). Thus was the foundation laid for the claim that all questions concerning the conduct of foreign policy are political questions.

stitute "hostilities," and whether such "hostilities" should be accorded statutory or constitutional significance, cannot hide behind evidentiary sleight of hand. To assign a burden of proof in such a context is to determine which party is likely to be believed and ultimately who shall prevail. This may not be a political question. But neither is it an "evidentiary" question. It is a legal question of statutory or constitutional interpretation.

Further, if in fact courts are being asked to decide all questions that come their way, without the benefit of easy technical solutions, then the domestic debate over the political question doctrine does become relevant. If courts *must* decide, are we willing to risk the resulting legitimization of a range of foreign affairs outcomes that currently remain contested? Under what circumstances should courts exercise their legitimating function? To pose this question is to invite a rematch between Wechsler and Bickel over the wisdom of an absolute duty of judicial review. Yet Franck, who has taught us much about the concept and consequences of legitimacy in other contexts,<sup>14</sup> chooses not to engage these questions.

A final problem is that, even on his own terms, Franck has set out to slay a hydra. After strenuously denying the difference between domestic and foreign affairs in the political question context, he admits it in the "evidentiary" context and argues that the difference justifies a different standard of review in foreign affairs cases rather than no review at all. Yet to argue that judges have a duty to decide and simultaneously to admit that they are susceptible to those perceptions of difference that ordinarily militate against principled decision is a worrisome combination. It heightens the danger that judges will accept outcomes abroad that they would reject at home. More fundamentally, because Franck himself has rightly defined the problem of the political question doctrine in foreign affairs cases as a problem of "difference," this admission threatens to undermine his entire project.

These criticisms notwithstanding, Franck's proposal has the advantage of removing the political question doctrine as a broad and easy avenue of judicial retreat, a road too often taken. Further, the dangers of unguided judicial discretion in Franck's model could be checked if coupled with a more precise answer to the "difference" question. I suggest that legal analysis alone cannot answer this question. We must turn instead to the study of foreign affairs itself.

International relations theory can help draw lines between foreign and domestic affairs. Equally important, it can help draw lines within foreign affairs, by distinguishing not only between types of issues, but also between types of *states*. It can help grapple with the underlying

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<sup>14</sup> See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 150-207 (1990).

sources of war and the safeguards of peace. And it can help develop a principled theory of the role of courts operating between states as well as within them. The development of these tools will permit the formulation of specific rules of decision in foreign affairs cases.

## I. TRANSFORMING POLITICAL QUESTIONS INTO LEGAL QUESTIONS

The core of Franck's argument is quickly summarized. The rule of law in the U.S. system is coextensive with judicial review. Judicial review should extend equally to foreign and domestic affairs. To the extent that the political question doctrine functions in foreign affairs cases as a mechanism that allows judges to abdicate their obligation of judicial review, it should be abolished. In its place, the United States should follow the German federal constitutional court in recognizing that distinctions between "political" and "legal" questions are inchoate and irrelevant as guides to judicial decisionmaking, and should hence adopt a presumption that *all* questions are justiciable. To take account of constitutionally granted discretion to the political branches in foreign affairs, courts should replace the political question doctrine with a "rule of evidence" designed to permit "due deference" to the political branches (p. 128). On Franck's logic, upholding the principle of judicial review in all cases extends the rule of law to foreign affairs, even if the practice of deferring to the Executive in its conduct of foreign affairs is left largely undisturbed.

### A. An Anglo-Saxon Problem

Among the many virtues of *Political Questions, Judicial Answers* is its detailed and lively history of the political question doctrine in foreign affairs cases. Franck identifies three components that ultimately merged to form the present-day doctrine. First is a historical "Faustian pact," "the giveback practice of judges who enlarge their jurisdiction over domestic political conflicts but then seek to pacify the enraged political beast by making a grand gesture of jettisoning judicial review of disputes touching foreign affairs" (p. 19).<sup>15</sup> Second is the unreflective adoption of a British precedent that affirmed an absolute and unreviewable royal foreign affairs power and accepted a monarchic tradition that the Court steadily rejected in domestic affairs

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<sup>15</sup> The initial bargain was struck in *Marbury v. Madison* itself, 5 U.S. (1 Cranch) 137 (1803), when the Supreme Court was still weak. Chief Justice Marshall used a foreign affairs example to illustrate the proposition that:

[T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. . . . The acts of such an officer, as an officer, can never be examinable by the courts (p. 3 (quoting *id.* at 165-66)).

(p. 12).<sup>16</sup> Third is the practice of "double-entry bookkeeping," cases in which courts purport to abstain from judicial review in one part of the decision, but in fact proceed to reach the same result via a full legal analysis of the merits in another (p. 21). Cases in this last category can be cited both in support of the political question doctrine and of the contrary proposition that courts are perfectly capable of adjudicating foreign affairs cases.

This account suggests that the political question doctrine in foreign affairs cases developed almost by default, with judges either performing their normal function or airily giving away their review powers in cases that had little to do with foreign affairs. It is the history of "How Abdication Crept In" (pp. 10-44). Yet if these are the origins of the political question doctrine in foreign affairs cases, they do not explain its continuing application to such cases. Franck instead emphasizes a pervasive judicial sense that foreign affairs are "different," "that 'it's a jungle out there' and that the conduct of foreign relations therefore requires Americans to tolerate a degree of concentrated power that would be wholly unacceptable domestically" (p. 14). This entrenched belief that foreign affairs are "different" informs three contemporary justifications for reliance on the political question doctrine to avoid decision of any issue with foreign affairs implications. Franck's presentation and rebuttal of each of these rationales yields three of the book's main themes.

The first rationale is itself grounded in the Constitution, the claim that the political question doctrine reflects "constitutionally mandated limits" (p. 31). The critical question here is who shall determine these limits, the courts or the political branches? Franck deems it a "self-evident proposition" that the courts should opine on the scope of the constitutional allotments of political discretion and thereby preserve their exclusive function of constitutional interpretation (p. 31). He firmly rejects the alternative position, that the Executive itself should determine the scope of its discretionary foreign affairs power and that this determination should be unreviewable. Such a claim, he argues, makes a mockery of the very notion of constitutional limits. Chapter Three traces this more expansive constitutional rationale back to its roots in British parliamentary practice, charts its definitive rejection by the Supreme Court in the 1950s,<sup>17</sup> and laments its irrational and unsupported persistence in the lower courts (pp. 31-44).

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<sup>16</sup> The British themselves, of course, had waged a long campaign to exert a Parliamentary check on the King in foreign affairs. Raoul Berger argues that the Framers sought to emulate this more recent British tradition. See Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 7-10 (1972). Franck does not address this point, but might argue that parliamentary control had merely displaced monarchic control, as opposed to a divided and checked system of power.

<sup>17</sup> The Court rejected this rationale in *Reid v. Covert*, 354 U.S. 1 (1957), holding that courts

A second rationale for the political question doctrine in foreign affairs cases does not deny courts the constitutional power to decide such cases, but argues that they should refrain because of "prudential concerns." These come in four flavors: the unavailability and unsuitability of factual evidence in foreign affairs cases; the lack of judicially manageable standards to resolve policy issues; the inadequacy of judges to decide matters that potentially affect the survival of the nation; and, the potential undermining of judicial legitimacy through noncompliance with judicial decisions in this area. In response, Franck first argues that the evidentiary question either requires courts merely to "decide complex issues of fact the *loci* of which are wholly or partially outside the United States" or "relates to evidentiary probity and onuses of proof," both of which are quite manageable problems (p. 48). Second, the articulation of manageable legal standards is a court's *job*; "only in international matters is a claim of 'no law' thought an acceptable judicial response to legal ambiguity" (p. 50). Third, courts do far greater damage to the national interest by disabling the safeguards afforded by judicial review in an entire class of cases than they could ever do by issuing rulings even in the midst of foreign affairs crises (p. 58). They do not make foreign policy thereby, but rather *judicial* policy, and thus speak with their own voice in a necessarily multivocal system (p. 5). Finally, Franck insists that concerns about the enforceability of judicial decisions are far more pertinent to the nineteenth century judicial system than to the twentieth, because the modern public has clearly accepted the necessity of "a nondemocratic body of decision makers deliberately insulated from popular political fashion and consciously protected from majoritarian will" (p. 60).

The third rationale for the political question doctrine is an outgrowth of part of the second: the "technical" objection that courts are untrained and hence unable to decide foreign affairs cases (pp. 6-7). Franck meets this objection by first setting forth the parade of horrors invoked by courts as reasons not to decide foreign affairs cases. He then systematically highlights the insubstantiality of such fears by examining all the cases in which courts *have* had the courage to adjudicate. When judges refuse to abdicate, he argues, "they demonstrate, though rarely expound, a conscious competence that reproves and rebuts the abdicationist judicial proclivity" (p. 63). In the process, they analyze and dismiss governmental assertions of foreign policy and national security interests as insufficient to justify the trampling of

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have the power to review the constitutionality of the exercise of military jurisdiction over an American citizen abroad, *see id.* at 18-19. Earlier, the Court had held that the treatment of nonresident enemy aliens by a military tribunal abroad was not subject to judicial review. *See Johnson v. Eisentrager*, 339 U.S. 763, 784-85 (1950).

individual property rights and civil rights.<sup>18</sup> Moreover, in two subject areas, Congress and the Executive have actually combined to mandate adjudication of such delicate questions as the scope of foreign sovereign immunity and the legality of foreign expropriations.<sup>19</sup> The rationale here, ironically enough, is the desire to depoliticize political questions by subjecting them to nondiscretionary judicial review bounded by relatively clear legislative standards.

A fourth and final theme running through all these chapters is the incoherence of existing precedent on the political question doctrine. Indeed, Franck argues that the doctrine is in a state of "jurisprudential chaos" (p. 8). It thus invites wholesale reform.

### B. A Teutonic Solution

Notwithstanding his pains to demonstrate that U.S. courts have indeed succeeded in adjudicating many foreign affairs cases with their legitimacy and judicial function intact, Franck clinches his argument by looking outside the U.S. system. Not to Britain, whose "system of executive prerogatives and parliamentary supremacy" the American framers strove to reject, but to the Federal Republic of Germany, "a system of separated powers, protected rights, and federalism readily comparable to our own" (p. 107). The German Constitutional Court has "staked out a middle course between judicial abdication and rampant judicial interference in the making and execution of foreign and security policy, one that satisfies systemic imperatives of the rule of law and political flexibility" (p. 107). German jurisprudence begins with the presumption that the tangle of potential distinctions between legal and political questions has no bearing on the amenability of cases to judicial resolution. Subject to constitutional procedures, *all* questions, in foreign as in domestic affairs, are presumptively subject to judicial review (p. 108).

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<sup>18</sup> The necessity of reaching a comprehensive claims settlement with Iran to resolve the hostage crisis did not prevent the Supreme Court from examining the takings claims of individual litigants. See *Dames & Moore v. Regan*, 453 U.S. 654, 674 & n.6, 688, 689-90 (1981). The Court ultimately sided with the Executive, but not on political question grounds. See *id.* at 688. In *Kent v. Dulles*, 357 U.S. 116 (1958), charges of communist infiltration proved unavailing against Mr. Kent's right to travel, see *id.* at 130. Similarly, in cases such as *I.N.S. v. Chadha*, 462 U.S. 919 (1983), and *United States v. American Tel. & Tel. Co.*, 567 F. 2d 121 (D.C. Cir. 1977), the courts have proved perfectly capable of umpiring separation of powers disputes between the executive and legislative branches, notwithstanding such foreign policy implications as the control of immigration and wiretapping for "national security" purposes (pp. 88-92).

<sup>19</sup> The examples here are the passage of the Second Hickenlooper Amendment, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (1964) (codified at 22 U.S.C. § 2370(e)(2) (1988)) (requiring courts to adjudicate the validity of takings alleged to violate international law), and the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988)) (setting forth the conditions under which suits may be brought against foreign sovereigns).

Although they begin at very different points, German and American courts end up at roughly the same place. Franck concedes that, "[m]easured by outcomes, the German judiciary, taking jurisdiction in virtually every instance, has upheld the contested foreign-policy and security initiatives of the political branches in roughly the same proportion . . . as the U.S. federal courts have by practicing abdication" (p. 124). The difference is that German courts profess to be more assertive than they actually are, whereas American courts pretend to be less assertive than they really are. For Franck, however, this is a difference that definitely makes a difference. The German approach is both internally consistent and "consonant with the rule of law" (p. 124). If German courts do not directly constrain the behavior of the political branches, they at least "speak, by word and example, as teachers," "manifesting that in government none are [sic] omnipotent and that the last word belongs to the least dangerous branch" (p. 125). The German approach is thus an appropriate model for the United States, one that can order its chaotic case law without unduly constraining its foreign policy.

The final two chapters of *Political Questions, Judicial Answers* are devoted to an elaboration of Franck's German-inspired approach to the political question doctrine. He would replace the doctrine with a "rule of evidence" and would condition judicial review in all foreign affairs cases on the adoption of an evidentiary standard designed to permit the political branches wide latitude and flexibility in the conduct of foreign policy. Even if U.S. courts can be convinced to recognize the distinction between deciding to engage in judicial review and deciding the substantive foreign policy questions at issue in these cases, they will still have "to confront the prudential problems posed by foreign-relations cases," first and foremost "the evidentiary one" (p. 130). From this perspective, the problem becomes how a court is to assess evidence that the political branches transgressed the constitutional boundaries of their discretion both to determine the nation's foreign policy goals and to choose the means to achieve them. The answer, adopted by the German Constitutional Court and suggested by the U.S. Supreme Court in *Fiallo v. Bell*,<sup>20</sup> a 1977 immigration case, is "a matter of onus and evidentiary weight" (p. 135). To give the political branches virtually free rein, the courts can place the burden of proof on the plaintiff and adopt a "rational basis" standard similar to normal administrative review. To tighten surveillance a bit, various levels of "intermediate scrutiny" might be adopted, such as one that allows a plaintiff relief if she can show governmental action to be "illogical and unjust."<sup>21</sup>

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<sup>20</sup> 430 U.S. 787 (1977).

<sup>21</sup> *Id.* at 809 (Marshall, J., dissenting). Franck implies that this standard might equally be applied in foreign affairs cases (p. 135).



Franck himself takes no position on which precise evidentiary standard should be adopted. He contents himself with making a strong case for shifting the entire debate from questions of exclusion or abstention to questions of evidence. Actual standards of review should presumably be worked out on a case-by-case basis. He does, however, devote a final chapter to "special cases" of in camera proceedings and declaratory judgments. He notes that German courts is not burdened with the leadership of the free world. U.S. courts, however, "must be aware of our foreign policy's special global role and its implications for the role of judges in reviewing the constitutionality and legality of policy choices made by foreign-policy managers" (p. 137). Two particular problems are "the government's legitimate need to protect a substantial hoard of secret data, sources, and methods, and its obligation as a superpower to use force quickly and decisively in confrontations with other states in some circumstances" (p. 138).

Once again, however, the solutions to these problems are readily found in analogous domestic circumstances. Secrecy concerns in Freedom of Information Act cases, sometimes directly related to foreign affairs issues, are routinely addressed by in camera proceedings. And in cases in which a court might be otherwise faced with a Hobson's choice of abdication or issuance of an injunction while U.S. troops are on the move, declaratory judgments provide a workable compromise. They allow "judges to declare the law without at the same time also compelling compliance" (p. 154). Thus can foreign relations be "conducted in accordance with the law, but not as invoked by the blade of a judicial guillotine" (p. 153).

## II. BEGGING THE (POLITICAL) QUESTION

### A. *The Limits of Legal Alchemy*

Franck's solution is seductive. He appears to transform political questions into legal questions through skilled legal alchemy: conceptual translation from one doctrinal vocabulary to another. Questions of justiciability can certainly be recast as standards of evidentiary review, just as questions of abstention can be recast as questions of conflicts of law, or questions of privacy as questions of equal protection. From the perspective of the disputants in any particular case, the outcome may be exactly the same, but a different and arguably more desirable principle is upheld. This reshaping of the legal landscape bypasses old obstacles and links previously isolated and separated areas, even if it inevitably highlights the contours of new problems.

Moreover, pondering the standard of review would seem to focus the attention of courts and commentators on the canon of foreign policy needs — secrecy, dispatch, flexibility — in the context of specific cases. On *these* facts, from war to wiretapping, what should be the

scope of political discretion? Franck's point here is less the transformation from political to legal questions, but from abstract to concrete questions. Once a court is seized of the merits of a particular dispute, it is less likely to be swayed by the "mystique" of foreign affairs and the siren song of national interest. On the contrary, he would argue, the government will have to fill those empty concepts with specific content and pinpoint the precise differences between foreign and domestic affairs that would justify a particularly lenient standard of review. Franck himself clearly anticipates such a case-by-case approach, as he refuses to recommend any particular standard of review and implies agreement with the dissent's characterization of the "rational basis" standard of review in *Fiallo v. Bell* as "toothless"<sup>22</sup> (p. 134).

On closer examination, however, Franck's formula for converting political questions into "evidentiary questions" is not a universal solution. "Evidentiary" has a reassuringly technical sound, associated with core judicial functions such as fact-finding and assigning burdens of proof. Therein lies its appeal to courts unsure of their footing in foreign affairs. Yet if so construed, the category of "evidentiary questions" can encompass only a fraction of the political questions Franck seems to transform. He actually relies on a much broader definition of "evidentiary," one that ultimately undermines its initial attraction.

Assume that a group of Congressional plaintiffs sues the Administration in an effort to enforce the War Powers Resolution.<sup>23</sup> They claim that U.S. troops acting as "advisors" to a Central American government fighting a civil war are in fact engaged in "hostilities" within the meaning of the Resolution, and thus that the sixty-day time clock established by the Resolution has begun to run.<sup>24</sup> Assuming that the court finds the plaintiffs to have standing, it would face several distinct questions. First, a determination of the facts about the actual conditions faced by U.S. soldiers in the region. Were they under fire? How frequently? With what intensity and duration? To make this determination, the court would hear evidence from a variety of sources: eyewitness testimony, evidence about the level of pay

<sup>22</sup> *Id.* at 805.

<sup>23</sup> 50 U.S.C. §§ 1541-1548 (1988). The text presents the facts of *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (*per curiam*), *cert. denied*, 467 U.S. 1251 (1984), a case dismissed in part on political question grounds, *see id.* at 808.

<sup>24</sup> Section 4(a)(1) of the War Powers Resolution, Pub. L. No. 93-148, § 4(a)(1), 87 Stat. 555-56 (1973) (codified at 50 U.S.C. § 1543(a) (1988)), requires the President to submit a report to the Speaker of the House and the President of the Senate when U.S. armed forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." *Id.* Under § 5(b), any such forces must be withdrawn within sixty days after a report is submitted or is required to be submitted, unless Congress has taken further action. *See* 50 U.S.C. § 1544(b) (1988).

received by troops in recognition of hostile conditions, evidence from intelligence sources.

Second, having found the facts, the court would have to interpret them. Even if U.S. troops are subject to enemy fire of a certain duration and intensity, what is the legal significance of these conditions?<sup>25</sup> Specifically, do they constitute "hostilities" in the sense meant by the War Powers Resolution? This question cannot be resolved by the presentation of evidence. On the contrary, it requires the application of a particular provision of law, an exercise that, in turn, requires the interpretation of both law and fact. It is a question not of evidence but of judgment, the very judgment courts seek to avoid when they invoke the political question doctrine.

A third question encountered by this hypothetical court would concern the constitutionality of the War Powers Resolution itself. Thus, even if the court found that the facts qualified as "hostilities" within the meaning of the statute, it could determine that Congress does not have the constitutional power to limit the Executive's discretion to deploy troops in the national defense by imposing a sixty-day time limit. Again, this question is not an "evidentiary question," but rather a question of constitutional interpretation.

For Franck, however, all three of these questions could be subsumed under the German approach. "[T]he German courts have re-defined the issue," he writes (p. 116).

It is not *whether* but *how* judges should decide: what evidentiary credence courts should give to the government's assessment of the facts; how much room they should leave the policymakers to choose among options; on what terms constitutionally protected yet conflicting public and private interests are to be reconciled (pp. 116-17).

Are these evidentiary questions? Yes, according to Franck, in the following sense: they shift the focus "from the issue of jurisdiction to the task of creating rules governing the weight and probity of government evidence in foreign-affairs litigation" (p. 117).

Thus defined, "evidentiary" encompasses the establishment of standards of review and canons of statutory interpretation. For example, the German courts "give the government the benefit of any reasonable doubt" in any foreign affairs case by requiring the plaintiff to "prov[e] the essential ingredients of unconstitutionality or illegality in the challenged actions of the government" (p. 117). Franck similarly classifies the adoption of a "presumption of constitutionality" by a German court

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<sup>25</sup> The International Court of Justice, faced with the task of determining whether U.S. support for the contras in Nicaragua constituted a violation of international law that prohibits the use of force, distinguished between determining what the United States in fact did (the "existence or nature" of the facts) and the "legal effects" of U.S. conduct. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 28, 33 (June 27).

faced with conflicting treaty interpretations as an "evidentiary [sic] presumption[]" (p. 117).

For Franck, the central evidentiary question in the hypothetical case posed is "[w]ho is to be believed about whether forces being dispatched overseas are going 'into hostilities'" (p. 131)?<sup>26</sup> He would favor the Secretary of Defense, and would thus favor the judicial fashioning of a standard of review designed to place the burden of proof on the government's challenger. Yet this analysis begs a fundamental legal, indeed constitutional, question. Even if the technical manipulation of the standard of review is a matter of "onus and evidentiary weight," the determination of how strict or lax that standard of review should be rests on a prior determination of the statutory or constitutional division of power in foreign affairs, a decision to tilt the balance toward the Executive or Congress or individuals affected by foreign policy decisions. This question is precisely what plaintiffs in the majority of foreign affairs cases would have the courts decide. Courts in Franck's scheme would decide it not "in evidentiary terms" (p. 130), but on the basis of a general presumption of deference to the Executive.<sup>27</sup>

### *B. The Limitations of Judicial Review*

If Franck cannot transform all questions of legal and political judgment into questions of trial technique, he has at least ensured that courts will exercise that judgment. Yet what substantive outcomes will judicial review of these questions yield? The answer to that question and the palatability of that answer, ignites an old debate.

1. *Bickel Redux: The Virtues of Passivity in Foreign Affairs.* — By raising the flag of judicial review and denying the difference between foreign and domestic affairs, Franck rejoins the great debates of the 1950s and 1960s about the role of the courts in a democratic society. He assumes Herbert Wechsler's mantle, arguing for an un-

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<sup>26</sup> The author quotes the War Powers Resolution, Pub. L. No. 93-148, §§ 3, 4(a)(1), 87 Stat. 555-56 (1973) (codified at 50 U.S.C. §§ 1542, 1543(a)(1)).

<sup>27</sup> Franck is in fact quite aware of the difference between technical evidentiary questions, standards of review or interpretation, and constitutional separation of powers questions. He categorizes the "judicial system's competence to decide complex issues of fact" that arise outside the United States and issues that relate "to evidentiary probity and onuses of proof" as two "fact-related grounds for judicial abstention" (p. 48). He then distinguishes between these grounds and the absence of applicable legal standards to apply to the facts the evidence establishes (pp. 48-49). All of the above prudential concerns are further distinguished from basic issues of constitutional allocation of competence, which Franck insists courts should resolve just as they would resolve questions of domestic constitutional interpretation (pp. 43-44). The problem is that Franck does not just answer each of these objections on their own terms. Rather, he offers his German-inspired "rule of evidence" as a comprehensive solution. The reader must conclude either that these issues must be subsumed within a vastly expanded "evidentiary" category, or that Franck offers no criteria for distinguishing between them.

qualified duty of judicial review.<sup>28</sup> In this guise, however, he must contend with Alexander Bickel, who defends the political question doctrine as the queen of the "passive virtues" that enable a court to decide when not to decide.<sup>29</sup> Franck purports to answer Bickel's defense of the doctrine by rejecting each of the various prudential concerns advanced in its support. His focus on the particulars of each of these objections, however, leads him to miss the larger thrust of Bickel's challenge.

Because Franck equates the rule of law with the exercise of judicial review, he would apply the rule of law to foreign affairs by establishing an absolute requirement of judicial review in foreign affairs cases. But how would he justify judicial review as a pillar of the domestic rule of law in a democracy? Franck never tackles this question directly. Bickel's answer, on the other hand — to take only one celebrated response to this perennial conundrum — illuminates the connection between the domestic and the foreign affairs debates over the political question doctrine and challenges many of Franck's implicit assumptions. Bickel argues that the legitimate exercise of judicial review in a democracy rests on a court's ability to articulate the "enduring values" of a society.<sup>30</sup> Thus legitimated, courts performing judicial review also perform a larger "legitimizing function," both by rallying support for particular legal positions and by symbolizing the power and continuity of the Constitution itself.<sup>31</sup>

Thus, courts must weigh their words. Equally important, they must know when to hold their peace as they wait for principle to ripen in the face of necessary political compromise.<sup>32</sup> The political question doctrine is just one of a number of "techniques that allow leeway to expediency without abandoning principle."<sup>33</sup> More specifically, political questions are questions about which we believe "that even though there are applicable rules, these rules should be only among the numerous relevant considerations."<sup>34</sup> The possibility of a decision on principle exists, but it must bow to necessity: the necessity of national security needs or the limits of domestic political consensus.<sup>35</sup>

From this perspective, little is to be gained by conditioning a guarantee of judicial review of foreign affairs cases only on the proviso

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<sup>28</sup> See Wechsler, *supra* note 7, at 2-3.

<sup>29</sup> BICKEL, *supra* note 8, at 183-97.

<sup>30</sup> *Id.* at 24-27.

<sup>31</sup> *Id.* at 30-33.

<sup>32</sup> See *id.* at 70-71.

<sup>33</sup> *Id.* at 71.

<sup>34</sup> *Id.* at 185 (quoting Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961)).

<sup>35</sup> See *id.* at 186-87.

that the courts give the political branches virtually free rein. Franck's German example is instructive here. Although it is true that the German Constitutional Court has on occasion been willing to give real teeth to its foreign affairs decisions, it has overwhelmingly tended to favor the Executive. Moreover, as Franck himself points out in arguing for special in camera proceedings and declaratory judgments, the German Court need not contend with the weighty responsibilities of superpower status. The temptation to rubber-stamp the Executive's foreign policy decisions is likely to be even greater in this country.

But if there is little to gain, there is much to lose. Justice Jackson spelled out Bickel's position with anguish and urgency in his dissent in *Korematsu v. United States*,<sup>36</sup> condemning his brethren for stretching the due process clause to permit the internment of Japanese-Americans on military orders.<sup>37</sup> He acknowledged the inherent difficulty of reviewing military orders. "But if we cannot confine military expedients by the Constitution," he argued, "neither would I distort the Constitution to approve all that the military may deem expedient."<sup>38</sup> Commenting on the nature of the legal process, he continued:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>39</sup>

Justice Jackson argued for a decision on the merits, on the principle that civil courts could not be required to enforce unconstitutional military orders. A majority of the Court was not persuaded, however. At such a pass, would not the political question doctrine have offered a second-best solution? The effective outcome would have been the same, but no principle could have been adduced "to expand itself to the limit of its logic."<sup>40</sup> Conversely, would it not have been worse for courts to have legitimized Executive foreign policy decisions in the various cases in which they did invoke the political question doctrine? To have affirmed the use of the Tonkin Gulf Resolution as a legal

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<sup>36</sup> 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

<sup>37</sup> See *id.* at 244-46.

<sup>38</sup> *Id.* at 244.

<sup>39</sup> *Id.* at 245-46.

<sup>40</sup> *Id.* at 246 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

basis for the war in Vietnam?<sup>41</sup> Or the President's failure to consult Congress on the use of force in El Salvador,<sup>42</sup> Nicaragua,<sup>43</sup> and the Persian Gulf?<sup>44</sup> To have sanctioned the Cuban expropriation of U.S. property?<sup>45</sup> To have endorsed the President's unilateral termination of a treaty?<sup>46</sup> To have authorized the U.S. government's blithe bypass of the arbitration provisions in the U.N. Headquarters Agreement?<sup>47</sup> Indeed, a cynical view would suggest that courts are perfectly capable of rejecting the political question doctrine when they have made up their minds to decide against the government, whether the U.S. government or a foreign power. They are more likely to invoke it as an alternative to deciding in favor of that government.

Affirmative legitimization of these outcomes would be problematic by any measure. But for the majority of scholars opposing the current use of the political question doctrine in foreign affairs cases, this solution could entail a new Faustian bargain. A primary concern of many foreign affairs scholars writing in the post-Vietnam era has been less to secure a theoretically consistent and politically justifiable account of the role of courts in a democracy than to police a range of

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<sup>41</sup> See generally John H. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 884-96 (1990) (discussing the political controversy surrounding the passing of the Tonkin Gulf Resolution); John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093, 1104-05 (1990) (discussing whether the Tonkin Gulf Resolution authorized the war in Laos).

<sup>42</sup> See *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982) (holding that a lack of judicially discoverable standards prevented adjudication of a claim that the President, the Secretary of State, and the Secretary of Defense supplied military equipment and aid to the Government of El Salvador in violation of the War Powers Resolution), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984).

<sup>43</sup> See *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 599-600 (D.D.C. 1983) (applying the political question doctrine to bar adjudication of claims by Nicaraguan citizens, U.S. Congressmen, and U.S. citizens challenging the Reagan Administration's support of the contras in Nicaragua and seeking damages and declaratory and injunctive relief), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985).

<sup>44</sup> See *Lowry v. Reagan*, 676 F. Supp. 333, 341 (1987) (dismissing on political question grounds congressional claims that Executive deployment of U.S. armed forces in the Persian Gulf violated the War Powers Resolution).

<sup>45</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 400-01 (1964) (applying the act of state doctrine to bar review of the validity of a Cuban expropriation of the property of U.S. citizens).

<sup>46</sup> See *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (holding that the President's unilateral termination of the Mutual Defense Treaty with Taiwan was a political question).

<sup>47</sup> See *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1461-63 (S.D.N.Y. 1988) (finding that the question whether the United States and the United Nations agreed to submit to binding arbitration of all disputes that arise under the U.N. Headquarters Agreement is a political question even in the wake of a decision of the International Court of Justice that interpreted the Agreement to contain such an obligation).

substantive outcomes in foreign affairs cases.<sup>48</sup> They would revive the "checking function" of courts more than the "legitimizing function,"<sup>49</sup> with the particular hope of checking the steadily expanding foreign affairs powers of the Executive branch.

2. *Franck's Rejoinder: Nothing Ventured . . .* — Several responses come to mind in defense of Franck's position. First is an argument that is second nature to any international lawyer: the attribution of some constraining power to the mere requirement of a justification for action. How else could the outlawing of war be expected to have any effect in the "anarchical society"<sup>50</sup> of nations, if not by at least requiring nations to offer a minimally plausible rationale for their actions?<sup>51</sup> On this logic, even the mildest form of judicial review will compel the government to justify its actions. This requirement, however loose, will strengthen a norm of accountability and will create a record that can later serve as a measuring stick for inconsistency and prevarication. A second and complementary re-

<sup>48</sup> See, e.g., MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 319-20 (1990) (complaining that "the Executive almost always wins if the courts sit on the sidelines" and citing an example from a challenge to the Vietnam War to demonstrate the implications of judicial abstention); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 146-49 (1990) (describing judicial refusal to examine challenges to the President's authority on the merits and implying that it contributed to the Iran-Contra affair and other cases of the Executive going "above" the law); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 17, 85-86 (1990) (stating that the courts should ensure that the Executive follows the laws of Congress and implying that the courts should prevent the Executive from "flout[ing] the law, as in the Iran-Contra disgrace"); Henkin, *Is There a "Political Question" Doctrine?*, *supra* note 9, at 624 ("I see no reason why the usurpation alleged in [cases challenging the constitutionality of the Vietnam War] should, exceptionally, have been exempt from judicial review."); see also David Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 *HARV. INT'L L.J.* 155, 158-68 (1985) (questioning the use of the political question doctrine to dismiss challenges to U.S. actions in Nicaragua); John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 *COLUM. L. REV.* 1379, 1406-12 (1988) (suggesting that the judiciary not employ the political question doctrine to avoid ruling on whether the Executive has complied with the War Powers Resolution); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 *VA. L. REV.* 1071, 1166-79 (1985) (arguing that the judiciary should not use the political question doctrine to abstain from reviewing alleged violations of international law by the other branches).

By drawing this contrast between the aims of foreign affairs scholars and their domestic counterparts, I do not mean to suggest that the domestic debate over the legitimacy of judicial review has no substantive stakes. But the titans of the legal process school regarded themselves as scholars engaged in a larger process of reconstruction, the relegitimization of courts after the assaults of legal realism. Indeed, Wechsler pursued his logic to the point that it threatened to undermine the legitimacy of *Brown v. Board of Education*, 344 U.S. 483 (1954), the outcome of which he wished to support. See Wechsler, *supra* note 7, at 31-34.

<sup>49</sup> BICKEL, *supra* note 8, at 29.

<sup>50</sup> HEDLEY BULL, *THE ANARCHICAL SOCIETY* 46 (1977).

<sup>51</sup> See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE* 28 (1968) ("Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behavior . . .").



sponse rests on the dynamic of judicial self-assertion. Martin Shapiro has demonstrated that even the mildest "giving reasons" requirements in administrative law tend inexorably to metamorphose into "giving good reasons" requirements, which in turn engage the courts in an inquiry into what constitutes a good reason in the particular substantive context at hand.<sup>52</sup> If this dynamic holds in the foreign affairs context, Franck's argument is a clever thin edge of the wedge, designed to excite as little objection as possible while ultimately fulfilling the highest aspirations of judicial activists in this area.

A third response would rely on historical experience of judicial assertiveness in foreign affairs. The perennial touchstone for those commentators who would see courts curb Executive power is *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>53</sup> in which the Supreme Court was willing to face down President Truman over his seizure of the steel mills during the Korean War.<sup>54</sup> The Court stood firm; the Executive gave way. With this model in mind, Franck's solution looks particularly promising. If nudging the courts back toward a *Youngstown* posture requires stiffening the judicial spine, then foreclosing the option of abdication is the necessary first step.<sup>55</sup>

These arguments raise their own rejoinders. *Youngstown*, for instance, was in many ways a *domestic* case. Justice Jackson worried above all that the President would be able to erode limits on his domestic powers by linking the exercise of such powers to his conduct of foreign affairs, which Jackson acknowledged "is . . . largely uncontrolled, and often even is unknown . . ." <sup>56</sup> Further, *Youngstown* must be contrasted with *Dames & Moore v. Regan*,<sup>57</sup> in which the plaintiff challenged the Executive orders that implemented the U.S.-Iranian claims settlement agreement as an unconstitutional taking of property held within the United States, just as plaintiffs in *Youngstown* challenged the seizure of the mills as a taking within the United States.<sup>58</sup> Justice Rehnquist, Justice Jackson's former clerk, applied the famous tripartite framework of analysis developed by Justice Jack-

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<sup>52</sup> See Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 187.

<sup>53</sup> 343 U.S. 579 (1952).

<sup>54</sup> See *id.* at 587-89.

<sup>55</sup> Both Harold Koh and Michael Glennon, to take only the most prominent examples, use *Youngstown* as a model of what Koh refers to as "balanced institutional participation" in foreign policy, a model that must somehow be reestablished. KOH, *supra* note 48, at 73; see GLENNON, *supra* note 48, at 199.

<sup>56</sup> *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring). Justice Jackson further declared his unwillingness to "circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief," as long as "the instruments of national force" were "turned against the outside world for the security of our society." *Id.* at 645.

<sup>57</sup> 453 U.S. 654 (1981).

<sup>58</sup> See *id.* at 662-67.

son in *Youngstown*, but this time to uphold the President's authority to conclude the agreement.<sup>59</sup>

It is possible to distinguish the two cases on various grounds, most notably the existence of a line of precedent that supports the Executive's authority to settle international claims.<sup>60</sup> Whether the penumbra of that authority should extend to the suspension of claims pending in U.S. courts in the absence of Congressional authorization is a harder question, one the *Youngstown* Court might well have answered negatively.<sup>61</sup> The *Dames & Moore* Court appears more likely to have been motivated by the perceived imperative of avoiding any decision that might have imperiled the U.S.-Iranian agreement for the release of U.S. hostages and thus undermined the credibility of any future administration in a similar situation. *Dames & Moore* is just as likely to serve as an exemplar for judges as *Youngstown*. If so, then the argument comes full circle, leading back to the prospect of increased judicial willingness to affirm unilateral Executive action in foreign affairs and thus to undermine further the original constitutional balance between the branches.

Franck chooses not to enter this debate, or at least not at this level. Rather than seeking to counter the risks of judicial legitimation, he simply accepts them. Indeed, he recognizes outright that "pusillanimity and deference, not exaggerated assertiveness, have marked almost every excursion by the American judiciary into foreign-affairs cases" (p. 159). He stands instead on loftier ground. Compelling the courts' performance of their constitutional duty, he argues, is a moral and political imperative (p. 159). He concludes: "America's principal shield and sword is not the nuclear bomb but the most powerful idea in today's political marketplace. That idea is the rule of law. To make the law's writ inoperable at the water's edge is nothing less than an exercise in unilateral moral disarmament" (p. 159).

Judicial review is thus its own justification. This argument from principle stands alongside a strong argument from pragmatism. The temptation to misuse and abuse the political question doctrine as a cover for judicial laziness or fear may simply be too great for judges skittish about any issue with implications beyond the nation's borders. No matter how often the incantation about the distinction between "political questions" and "political cases" is uttered,<sup>62</sup> the doctrine remains an easy out.

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<sup>59</sup> See *id.*

<sup>60</sup> See, e.g., *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

<sup>61</sup> See KOH, *supra* note 48, at 139-40.

<sup>62</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'").

As it stands, the above critique is inconclusive. It depicts Franck's position as offering a choice between no law and bad law, swapping one evil for another. I suggest, however, that the trade-off need not be so stark. In Franck's scheme, I have suggested, courts will face strong incentives to place the stamp of legality on the dictates of necessity. These incentives are rooted in the subterranean source of the political question doctrine, the deeply felt difference between foreign and domestic affairs that gives the doctrine life. Franck recognizes the "difference problem" from the outset, but ultimately fails to resolve it. This failure in turn undermines the desirability of his proposed reform of the political question doctrine. To make judicial review in foreign affairs cases more than a rubber stamp, courts must be able to determine when in fact they can exert the same checks on the exercise of government power abroad as they would at home. The development of criteria to permit this determination would thus complement and improve Franck's solution. In the following section, I suggest ways of pushing beyond Franck's analysis to confront the difference problem head on.

### III. POLITICAL QUESTIONS, POLITICAL SCIENCE ANSWERS

The running theme of *Political Questions, Judicial Answers* is that foreign affairs are not sufficiently different from domestic affairs to justify application of the political question doctrine. In the context of his own solution, however, Franck must ultimately admit that foreign affairs *are* sufficiently different from domestic affairs to justify a different standard of judicial review in foreign affairs cases. But what is his metric of difference? Why should not the perception or intuition of difference that leads a court to place a high burden of proof on a plaintiff who challenges governmental action in foreign affairs justify the refusal to engage in judicial review altogether?

Franck might argue here for degrees of difference. Nevertheless, his readmission of the difference problem in the "evidentiary" sphere remains troubling. The court is still acknowledging grounds for departure from the criteria that it would ordinarily apply to the review of governmental action in the domestic sphere. The principles underlying such criteria must now give ground to the political necessities of diplomacy. The law-politics divide here is coextensive with the perceived domestic-foreign divide. Thus, the court is still effectively identifying "political questions," even if it does so as part of the exercise of judicial review. And it has no principles for distinguishing between such questions other than the inchoate perception of yet finer degrees of difference.

Abolishing the political question doctrine will thus abolish political questions only in the most technical sense. Courts remain without compass in the adjudication of foreign affairs cases. They need spe-

cific rules of decision derived from more general principles that establish when and how the differences between foreign and domestic affairs justify different legal outcomes. Here the Constitution is silent, as Franck himself admits when he concedes the possibility of multiple standards of review. I would go further and argue that law alone, at any level, is unlikely to provide much guidance. We need a theoretical framework that will permit us to organize and use empirical evidence about how the world actually works.<sup>63</sup> Just as tort law must ultimately rely either on a theory of morality or of economics, so foreign affairs law requires a theory of international relations.

Let me not claim too much here. No general theory, no matter how powerful and strongly supported by empirical data, can definitively answer a specific set of legal questions. But an understanding of the determinants of peace and war and the relations among different types of states can at least be used to generate general principles to guide foreign affairs lawyers in a more nuanced quest for specific rules of decision.

#### A. Two Views of the World

Much current foreign affairs law is implicitly informed by a particular school of international relations theory, a school described by one leading political scientist as the dominant paradigm of international relations over the past two millennia.<sup>64</sup> This theory is political realism, an approach best known among international lawyers for its disdain of legal norms in international relations. Political realists accept a model of states as unitary actors whose external behavior is unrelated to internal structure and purpose. Regardless of domestic political, economic, or social configuration, states' relations with one another revolve around the struggle for power.<sup>65</sup> When translated

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<sup>63</sup> Legal scholars in this field are no strangers to domestic political theory. See, e.g., HENKIN, *supra* note 48, at 4-16, 41-43 (tracing the shift of the United States from a republic to a democracy and spelling out the implications for foreign affairs law). Others have drawn on the work of contemporary international relations theorists. See, e.g., KOH, *supra* note 48, at 96-100, 118-23, 224-28 (charting the impact of the United States's changing global role and the growth of international institutions on U.S. constitutional law and the separation of powers). Yet few international legal scholars have confronted international relations theory on its own terms as a comprehensive theory of how nations behave within the international system, or set out systematically to analyze the implications of competing theories for either international or domestic law.

<sup>64</sup> See Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, in *NEOREALISM AND ITS CRITICS* 158, 158 (Robert O. Keohane ed., 1986).

<sup>65</sup> Hans Morgenthau pioneered a revival of political realism in the 1940s. A more recent refinement of political realism is structural realism, or neo-realism, developed principally by Kenneth Waltz. Structural realists assume that international behavior is dictated entirely by external systemic constraints such as the geopolitical configuration of power. For an overview of this literature, see Anne-Marie Slaughter Burley, *International Law and International Rela-*

into law, realism argues for a radical break between domestic and foreign affairs.

Consistent with this legacy, the United States has long espoused a modified dualist stance whereby it presents one face to the international legal system and another to its own.<sup>66</sup> The courts determined in the late nineteenth century that domestic statutes could override international treaty obligations as long as the statutes were later in time.<sup>67</sup> The nation could thus be governed by one set of legal rules within and another without, with the Executive alone charged with repairing the damage to the nation's international relations. This divide only deepened with the *Curtiss-Wright* cult of the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in international relations."<sup>68</sup> Justice Sutherland's determination to cast the Executive as sole repository of the external sovereignty of the nation can be understood as the quintessential expression of realist theory in foreign affairs law. The Executive alone represents the state as a unitary actor in international relations, a sovereign among sovereigns, freed of whatever constraints might otherwise be imposed by the domestic political system. Further, the Executive's authority in foreign affairs flows not from the people of the United States, but from the autonomous logic of the international system. In 1936, when Justice Sutherland wrote these ideas into law, that logic appeared once again to be the realist logic of the balance of power.<sup>69</sup>

To the extent realism buttresses the difference between domestic and foreign affairs, it buttresses the political question doctrine. Lawyers of Franck's persuasion will therefore find more comfort in liberal international relations theory, the principal alternative to realism. Among international relations scholars, the label "liberal" has often served as an umbrella term for a wide range of utopian schemes, from

*tions Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993). See generally CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS 30-38, 54-64 (Stanley Hoffmann ed., 1960) (critiquing realist theory and excerpting from the work of Hans J. Morgenthau); Arnold Wolfers, *Introduction: Political Theory and International Relations*, in THE ANGLO-AMERICAN TRADITION IN FOREIGN AFFAIRS at ix, x (Arnold Wolfers & Laurence W. Martin eds., 1956) (reviewing the origin and underpinnings of the realist school of thought).

<sup>66</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1986).

<sup>67</sup> See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889) (The Chinese Exclusion Case); *Edye v. Robertson*, 112 U.S. 580, 597-99 (1884) (Head Money Cases); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1986).

<sup>68</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). For additional discussion of *Curtiss-Wright*, see above note 13 and accompanying text.

<sup>69</sup> For a powerful account of the need to reorient the discipline of international relations toward Realist thinking in the late 1930s, see EDWARD H. CARR, *THE TWENTY YEARS' CRISIS: 1919-1939* (2d ed. 1954).

world government to the dissolution of the state.<sup>70</sup> As used here, however, liberalism refers to the international dimension of domestic liberal political theory.<sup>71</sup> In a nutshell, liberalism looks beyond states to individual and group actors in domestic and transnational civil society; emphasizes the representativeness of governments as a key variable in determining state interests; and, focuses less on power than on the nature and strength of those interests in international bargaining.<sup>72</sup> In contrast to realism, liberalism distinguishes among relations between different types of states. The result is not the moralism of misunderstood Wilsonianism, but a more sophisticated and pragmatic framework for both analysis and prescription.

The most important empirical confirmation of liberal theory is evidence of the "liberal peace."<sup>73</sup> Liberal states, defined as states with representative governments, market economies, and constitutional protections of civil and political rights, are far less likely to go to war with one another than with nonliberal states, or than nonliberal states are likely to go to war with one another.<sup>74</sup> I have argued elsewhere that this difference in military-political relations among liberal states is replicated in various ways in their legal relations.<sup>75</sup> Some of these differences, in turn, implicate and undermine the alleged difference between domestic and foreign affairs.

This Review is not the place to explicate a liberal theory of the political question doctrine, much less of foreign affairs law. For purposes of the present discussion, the key point is that, to the extent current foreign affairs doctrines reflect and reinforce realist assumptions, liberal theory can be used to critique those assumptions and illuminate new doctrinal solutions. In particular, liberal analysis casts a new light on the "difference problem." It also generates substantive precepts applicable to common problems in foreign affairs law. Use of such analysis together with Franck's framework, or any other proposal for obligatory judicial review in foreign affairs cases, would not only require judges to decide such cases, but would give them the tools to reach a substantive decision. The following two sections offer

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<sup>70</sup> See ANDREW MORAVCSIK, *LIBERALISM AND INTERNATIONAL RELATIONS THEORY* 1-3 (undated) (Center for International Affairs, Working Paper No. 92-6).

<sup>71</sup> See *id.* I have summarized these findings and spelled out their implications for domestic, transnational, and international law in *International Law and International Relations Theory: A Dual Agenda*. See Burley, *supra* note 65, at 226-39.

<sup>72</sup> See MORAVCSIK, *supra* note 70, at 6-13.

<sup>73</sup> Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *PHIL. & PUB. AFF.* 205, 213-15 (1983) [hereinafter Doyle, *Kant*]; Michael W. Doyle, *Liberalism and World Politics*, 80 *AM. POL. SCI. REV.* 1151, 1151 (1986) [hereinafter Doyle, *Liberalism*].

<sup>74</sup> See Doyle, *Kant*, *supra* note 73, at 213 & n.7.

<sup>75</sup> See Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 *COLUM. L. REV.* 1907, 1916-23 (1992).

a sampling of some potential applications of liberal theory to issues left unresolved by Franck's treatment of the political question doctrine.

### *B. Acts of (Some) State(s) as Political Questions*

Liberal theory asserts that foreign affairs differ most sharply from domestic affairs in relations between liberal and nonliberal states. Conversely, in relations among liberal states, foreign and domestic affairs are most convergent. This schema is oversimplified and highly stylized. It is not necessarily applicable to all contexts. But it is a valuable starting point for analysis, particularly regarding the class of cases that involve challenges to the act of a foreign state. Franck cites a subset of these cases as examples of the success of mandated adjudication,<sup>76</sup> but he ignores Justice Brennan's influential characterization of the validity of the act of a foreign state as a political question.<sup>77</sup> The act of state doctrine bars review of the validity of such an act.

Liberal theory replaces a vertical image of a world divided into the international and domestic levels with a horizontal image of concentric circles. At the center are liberal states, relations among which most closely fit Robert Keohane's and Joseph Nye's concept of "complex interdependence": societies connected by "multiple channels" of communication and action that are "transgovernmental" rather than formally "interstate"; in which the "distinction between domestic and foreign issues becomes blurred," unlike the traditional divide between the high politics of security and the low politics of economy; and in which "[m]ilitary force is not used by governments toward other governments within the region."<sup>78</sup> The next circle includes "quasi-liberal" states, which possess some but not all liberal attributes. The most common members of this group are states with an open market economy but an unrepresentative government. The periphery is reserved for nonliberal states, whose relations with one another and with liberal states conform much more to the traditional realist model of single channels of communication, a sharp divide between domestic and foreign affairs, and relatively frequent resort to force.

When superimposed on the constellation of doctrines that regulate litigation with foreign sovereigns,<sup>79</sup> this schematic justifies treating all

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<sup>76</sup> See *supra* note 18.

<sup>77</sup> See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 787-89 (1972) (Brennan, J., dissenting). For discussion of cases in which the act of state doctrine has been applied to bar adjudication on political questions grounds, see Burley, cited above in note 75, at 1965-69.

<sup>78</sup> ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 25 (1977).

<sup>79</sup> Representative cases include not only cases in which a foreign sovereign or one of its agencies or instrumentalities is actually a party, but also cases in which the interpretation or review of a sovereign act is at issue.

cases within the liberal-liberal zone as if there were no difference between foreign and domestic affairs. That is, courts should interpret and apply legal rules regardless of whether those rules are embedded in domestic or foreign law, without extraordinary deference to "political" considerations. The political question doctrine would apply within this zone only when and to the same extent that a court would be inclined to apply it on a parallel set of domestic facts. If Franck is right that the doctrine is fading in domestic law (p. 19),<sup>80</sup> it should similarly atrophy in all litigation involving liberal states. Outside the purely liberal realm, or on the border, a doctrine like the political question doctrine could still serve an important function if recast in meaningful symbolic terms as a delimitation of the boundary between the liberal and the nonliberal world. Foreign governments that themselves uphold the rule of law should be subject to its transnational extension. Foreign states that do not are beyond the realm of judicial competence to control.

Courts already differentiate between these two classes of states in a variety of private international law doctrines that require an assessment of the "adequacy" of the proposed foreign forum, an invitation to judge foreign compliance with general liberal notions of due process of law.<sup>81</sup> These are surely determinations that are within judicial expertise to make and that can also serve as relatively depoliticized proxies for the liberal-nonliberal distinction. In the political question arena, challenges to the acts of foreign governments that themselves provide an adequate forum might thus be adjudicated under ordinary conflicts principles; challenges to the acts of foreign governments that provide no such forum would be deemed beyond the scope of judicial competence.<sup>82</sup>

### *C. A Liberal Mandate of Representation and Deliberation*

Foreign acts of state are but one relatively small dimension of the political question doctrine. The harder challenge is to generate rules of decision in the wide range of separation of powers and individual rights cases that Franck catalogues as inviting judicial abdication. Such cases typically raise questions of domestic statutory and constitutional law that cannot be resolved by reference to a distinction between liberal and nonliberal states. They may nevertheless be illuminated by other insights from liberal theory. As a stimulus to

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<sup>80</sup> *But see* Nixon v. United States, 113 S. Ct. 732, 740 (1993) (holding that the impeachment power is committed to the Senate and thus not judicially reviewable); *supra* p. 1980.

<sup>81</sup> *See* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 263-64, 314, 769 (2d ed. 1992).

<sup>82</sup> This is a variation on a liberal revision of the act of state doctrine. I have spelled out this theory in considerably more detail elsewhere. *See* Burley, *supra* note 75, at 1986-95.



further thought on the entire spectrum of legal and political questions, let me conclude by sketching one way that liberal theory could be used to buttress the constitutional command of legislative deliberation in war powers cases.<sup>83</sup> Such reinforcement could work to convince a court that had adopted Franck's evidentiary framework in place of the political question doctrine to stand up to the Executive even when the perceived dangers of foreign affairs might most seem to command deference.

A definitive and credible social scientific explanation for the "liberal peace" is still lacking, but political scientists in the field generally agree that part of the explanation rests on the twin factors of representation and deliberation.<sup>84</sup> The best check on unnecessary or premature mobilization for war, as Jefferson and Hamilton well knew, is to transfer the decision to go to war "from the Executive to the Legislative body, from those who are to spend to those who are to pay."<sup>85</sup> Those who are to bear the physical and financial burdens of war must be represented in the decisionmaking process, and not by an elected Executive alone.<sup>86</sup> A second key element is the drag effect created by democratic deliberation. The need to ponder and debate decisions as momentous as those concerning the use of force appears to generate postures of prudence and caution that provide for critical "cooling off periods" between two liberal states.<sup>87</sup>

<sup>83</sup> The issues raised in this section are many and complex, as are the variants of liberal theory that might be used to address them. I offer the thoughts that follow only as a point of departure for further analysis.

<sup>84</sup> See IMMANUEL KANT, *PERPETUAL PEACE* 11-15 (Lewis W. Beck ed., 1957) (1795); Bruce Russett, *Politics and Alternative Security: Toward a More Democratic, Therefore More Peaceful, World*, in *ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE* 107, 111 (Burns H. Weston ed., 1990).

<sup>85</sup> Letter from Thomas Jefferson to James Madison (1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 397 (Julian P. Boyd ed., 1961); see also *THE FEDERALIST* No. 24, at 158 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the power to raise armies was in the legislature and that even they should only appropriate money for no more than two years). John Jay also noted the additional causes of war brought about by absolute monarchs, who "will often make war when their nations are to get nothing by it . . ." *THE FEDERALIST* No. 4, at 46 (John Jay) (Clinton Rossiter ed., 1961). In some ways Hamilton appears to have met the liberal challenge head on. He specifically inveighed against "visionary or designing men, who stand ready to advocate the paradox of perpetual peace between the States" and offered historical examples to rebut each of the purported liberal wellsprings of peace. *THE FEDERALIST* No. 6, at 56 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet elsewhere even he was willing to "[a]dmit[] that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state . . ." *THE FEDERALIST* No. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>86</sup> Madison wrote to Thomas Jefferson that "the constitution supposes, what the History of all Gov[ernmen]ts demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ature]."<sup>87</sup> GLENNON, *supra* note 48, at 82-83 (citation omitted).

<sup>87</sup> See BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD-WAR WORLD* 38-40 (1993).

Taken together, these twin factors argue strongly for the role of representative legislatures as a primary bulwark against war among liberal states. Consider then the familiar scenario of an individual or Congressional challenge to an unauthorized use of force by the Executive. Liberal international relations theory would argue for the judicial reassertion of Congressional prerogatives against an alleged Executive usurpation of the war powers.<sup>88</sup> The harder question is whether a court should adopt this posture when, as liberal theory predicts will be more likely, the Executive seeks to use force against a *nonliberal* state, a state without the reciprocal safeguards of representation and deliberation. In such cases, judicial insistence on legislative participation in a decision to use force is less likely to produce an actual check on military conflict, because legislatures of liberal states have proved easier to mobilize against nonliberal states.<sup>89</sup> When such support is not forthcoming, however, the Executive should know it at the outset. A fuller answer to this question must await further inquiry into the causes and mechanisms of war between liberal and nonliberal states.

Courts could apply the same principles of representation and deliberation to prevent the Executive from circumventing Congress via the decisionmaking processes of international organizations such as the United Nations. Suppose that President Clinton dedicates an entire U.S. brigade to U.N. service, to be ordered into action at the behest of the Security Council, under U.S. generals who report to a U.N. supervisory committee. He is hailed worldwide for U.S. leadership in creating a new global security system. As a crisis brews in the former Soviet Union, the new U.N. forces, including the U.S. brigade, prepare to intervene not as peacekeepers, but as peacemakers.<sup>90</sup> A group of members of Congress, including the chairpersons of both the House and the Senate Armed Services Committees, sues President Clinton for violating the U.N. Participation Act of 1945. The Act provides that Congress must approve any special agreement between the Executive and the United Nations on the assignment of U.S. forces.<sup>91</sup>

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<sup>88</sup> See U.S. CONST. art. I, § 8, cl. 11 (the War Powers Clause). Koh, Henkin, and Glennon all chronicle the progression of this usurpation. See GLENNON, *supra* note 48, at 71-122; HENKIN, *supra* note 48, at 26-34; KOH, *supra* note 48, at 117-33.

<sup>89</sup> See RUSSETT, *supra* note 87, at 38-40; Doyle, *Kant*, *supra* note 73, at 225; Doyle, *Liberalism*, *supra* note 73, at 1156-57.

<sup>90</sup> See *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Agenda Item 10, at 10-16, UN Doc. A/47/277 (1992) (urging expansion of U.N. functions from peacekeeping to peacemaking and peace enforcement).

<sup>91</sup> See United Nations Participation Act (UNPA), Pub. L. No. 264, § 6, 59 Stat. 619 (1945) (codified at 22 U.S.C. § 287d (1988)).

A court that confronted this case would have to choose between what Jane Stromseth has identified as the "political accommodation" and the "contractual" models of the distribution of war powers.<sup>92</sup> The political accommodation model would favor the application of the political question doctrine to this dispute, on the theory that the political branches must be left to strike their own equilibrium.<sup>93</sup> The contractual model, by contrast, would require application of the U.N. Participation Act on the premise that the political branches should enter into explicit legislative agreement whenever possible.<sup>94</sup> Franck would probably favor the contractual model, although he is also on record as favoring wide Executive powers over the disposition of troops in U.N. actions.<sup>95</sup> Yet under his standard of review, the Executive might be required only to make a *prima facie* showing of authority under the U.N. Charter.

A normative application of liberal theory would again place a premium on state representation of the widest possible range of individual and group interests. Representation is too important a factor in international relations to be left to the vagaries of shifting legislative-executive compromise. A court should thus decide this case in favor of the contractual model and interpret applicable legislative provisions such as the U.N. Participation Act to require maximum congressional input. Broader application of this liberal precept gives rise to a grander vision of nations around the world coupling their input to U.N. decisionmaking with the output of their national legislatures, thereby creating a horizontal global political process.<sup>96</sup>

Conservatives (on the conventional American "liberal-conservative" spectrum) will yawn. What is this prescription but yet another guise for the Democrats' insistence on congressional foreign policy prerogatives, a position honed by four decades of mostly divided government

<sup>92</sup> Jane E. Stromseth, *Rethinking War Powers: Congress, the President and the United Nations*, 81 GEO. L.J. 597, 600-01 (1993).

<sup>93</sup> See Phillip R. Trimble, *The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists*, 137 U. PA. L. REV. 1461, 1477-80 (1989); Phillip R. Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750, 752-55 (1989). For a similar argument, see *The Constitutional Roles of Congress and the President in Declaring and Waging War, Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 456 (1991) (statement of Gary Born, Partner, Wilmer, Cutler & Pickering).

<sup>94</sup> See Stromseth, *supra* note 92, at 666-72.

<sup>95</sup> See Thomas M. Franck & Faiza Patel, *Agora: The Gulf Crises in International and Foreign Relations Law*, 85 AM. J. INT'L L. 63, 74 (1991) (arguing that the adoption of the U.N. Charter in 1945 outlawed war and replaced it with "police actions," and that, by ratifying the Charter, Congress agreed to allow the Executive to commit standing troops to engage in such police actions). Stromseth describes this third position as one representative of the "police power model." Stromseth, *supra* note 92, at 660-64.

<sup>96</sup> A visionary, if occasionally challenging, projection of this concept to its furthest extreme is Philip Allott's "international society . . . of all societies." Philip Allott, *Reconstituting Humanity — New International Law*, 3 EUR. J. INT'L L. 219, 250-51 (1992).

and mostly Republican presidents? The significance of liberal international relations theory is that it links constitutional principle with national security. It prescribes action based not on notions of setting an example for the world, nor on fears of imitating and thus becoming the enemy.<sup>97</sup> It argues instead that linking decisions to use force with a maximally representative process of deliberation is the best guarantee of preserving the fragile island of peace the world has thus far secured.

#### IV. CONCLUSION

*Political Questions, Judicial Answers* is particularly timely because many former (American) liberal opponents of the political question doctrine will soon be rediscovering its charms. After a decade during which appeals to liberal judges often seemed the only restraint on the conservative foreign policy of the Reagan-Bush era, a struggle now looms between a liberal executive and legislature and a conservative judiciary. Imagine suits challenging potential efforts by President Clinton to maximize the flow of U.S. aid and material to the former Soviet Union; to pressure Israel to honor the civil rights of suspected radical Palestinians; or, to lift the ban on would-be visitors who test HIV-positive. In this context, Franck's approach has the virtue of principle. He is willing to abjure application of the political question doctrine even when it would yield substantive outcomes that he might well approve. Of course, given the leniency of the standard of review that he is willing to countenance, judicial scrutiny would be unlikely to alter these outcomes. Query whether he would be equally satisfied with the results of his prescriptions after a change in administration.

I have suggested that Franck's proposal to reform the political question doctrine is quite likely to result in the affirmative legitimization of many actions undertaken by both the U.S. and foreign governments, and that this result will be a function of a more general absence of any specific criteria to guide review of such actions. Courts will be left with the conviction of difference and the judicial diffidence that it typically engenders. Within Franck's framework, this alleged difference between foreign and domestic affairs is not dispersed or dispelled, but only displaced. To grapple with it directly, lawyers must venture beyond the borders of their own discipline and join the study of law with the study of foreign affairs. They must turn to political science to grapple with the ultimate riddle of political questions.

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<sup>97</sup> Justice Jackson spells out this fear most eloquently in the *Steel Seizure Cases*, comparing the states of emergency authorized by the legislature in France and Britain in World War II with the emergency powers seized by the Executive in Germany. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651-52 (1952) (Jackson, J., concurring).

Franck has laid the necessary foundation for a bridge to international relations theory. Further, in other work he has shown himself adept at the application of liberal international relations theory, the school that I have proposed as the most promising source of insights and principles for those engaged in his overall project of extending the rule of law to foreign affairs. For instance, he has pioneered the concept of a human right of "democratic governance" by relying in part on evidence of the liberal peace.<sup>98</sup> *Political Answers, Judicial Answers* undertook a different task: the redrawing of doctrinal lines to reach the best possible trade-off among competing values. On balance, he offers a sophisticated and provocative, if partial, solution. It is up to his readers to take the next step.

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<sup>98</sup> Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 88 (1992).

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