

Brooklyn Journal of International Law

Volume 27

Issue 3

SYMPOSIUM:

International Telecommunications Law in the Post-Deregulatory Landscape

Article 8

2002

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Recommended Citation

Moses D. Breuer, *Casting a Constitutional Controversy as a Nonjusticiable Political Question: Made in the USA Foundation v. United States*, 27 Brook. J. Int'l L. (2002).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol27/iss3/8>

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NOTES AND COMMENTS

CASTING A CONSTITUTIONAL CONTROVERSY AS A NONJUSTICIABLE POLITICAL QUESTION: *MADE IN THE USA FOUNDATION v. UNITED STATES*

I. INTRODUCTION

On February 27, 2001, the Court of Appeals for the Eleventh Circuit held that the determination of whether an international trade agreement constitutes a “treaty” within the meaning of the Treaty Clause of Article II of the Constitution presents a nonjusticiable political question.¹ Because the constraints of the political question doctrine preclude the court from deciding at which point an international agreement rises to the level of a treaty, it lacks the jurisdiction to reach the merits on the question of whether the North America Free Trade Agreement (“NAFTA” or “Agreement”)² required Senate ratification pursuant to the Treaty Clause.³ The circuit court’s decision reversed the United States District Court for the Northern District of Alabama, which held that the issue of whether NAFTA is a treaty is not a political question and is therefore subject to judicial review.⁴ In so deciding, the district court proceeded to rule on the merits, holding that Congress’ power to adopt

1. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001), *cert. denied sub nom.*, *United Steelworkers of America v. United States*, 122 S. Ct. 613 (2001) [hereinafter *Made in the USA II*].

2. *See* North America Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301-3473 (1994)) [hereinafter *NAFTA Implementation Act*].

3. *Made in the USA II*, 242 F.3d at 1300.

4. *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1275 (N.D. Ala. 1999), *rev’d*, 242 F.3d 1300 (11th Cir. 2001), *cert. denied sub nom.*, *United Steelworkers of America v. United States*, 122 S. Ct. 613 (2001) [hereinafter *Made in the USA I*].

NAFTA derives from its powers under the Foreign Commerce Clause and that the scope of such power is plenary.⁵ Thus, because the Foreign Commerce powers are unlimited, they cannot be constraint by the requirements of the Treaty Clause.⁶ Consequently, the Agreement's adoption was constitutional, notwithstanding Congress' failure to adhere to the treaty ratification procedure as outlined in the Treaty Clause.⁷

In concluding that the issue presents a political question and is therefore nonjusticiable, the circuit court pointed to two aspects of the controversy that lend support to its political, and therefore nonjusticiable, character. First, as an international agreement, the parties and relationships involved are foreign entities and foreign policy matters, and in the area of foreign affairs, the judiciary has traditionally practiced great restraint vis-à-vis the political branches.⁸ Second, because the substantive matter of the Agreement involves commercial activity, as opposed to, say, military affairs, Congress' power under the Foreign Commerce Clause is plenary and therefore unreviewable by the courts.⁹ Consequently, the court reasoned, as a commercial, international agreement, the constitutionality of the means utilized to adopt NAFTA cannot be subject to judicial review.¹⁰

Tellingly, then, the circuit court's reasoning leading to its refusal to consider the merits of the controversy is strikingly analogous to the district court's reasoning *on* the merits. While the latter court relied on the Executive's foreign affairs prerogative¹¹ and Congress' Foreign Commerce Clause power¹² to

5. *Id.* at 1319-20.

6. *Id.*

7. *Id.* at 1323.

8. *See Made in the USA II*, 242 F.3d at 1311-12 (judicial nonintervention is confirmed by historical practice and Supreme Court precedent); *id.* at 1312 n.27 (pointing to history which informs the inquiry into the political branches foreign affairs power); *id.* at 1313 (the conduct of foreign relations is committed to political branches and is not subject to judicial inquiry).

9. *See id.* at 1314 ("[W]ith respect to commercial agreements, we find . . . the Constitution's clear assignment of authority to the political branches.").

10. *Id.* (arguing that courts overseeing the President and Congress in this matter is intrusive).

11. *Made in the USA I*, 56 F. Supp. 2d at 1322 ("[T]he President . . . was acting pursuant to his constitutional responsibility for conducting the Nation's foreign affairs."). For authorities cited in support of the generally ac-

support its holding that NAFTA was adopted in a constitutional manner,¹³ despite the failure to adhere to the Treaty Clause's requirements, the former court relied on the same prerogative and the same power to hold that the issue at controversy is solely within the realm of the political branches.¹⁴ Consequently, the political branches' dominion over such matters is so absolute that it precludes the judiciary from deciding the constitutionality of the means chosen for the Agreement's adoption.¹⁵ Given the diametrically opposite conclusions reached on the political, and hence nonjusticiable, nature of the questions considered, and in light of the parallels in the reasoning employed by the courts in reaching such disparate conclusions, the amorphous nature of the political question doctrine becomes apparent.¹⁶ Thus viewed, these holdings provide fuel for stoking the recurrent debate¹⁷ as to the legitimacy, function and scope of the exceptions to judicial review in a democratic society,¹⁸ particularly with respect to foreign affairs.¹⁹

cepted view that matters of foreign policy are particularly the province and responsibility of the President, see *id.* at 1322 n.351; *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988); *Haig v. Agee*, 453 U.S. 280, 293-94 (1981).

12. *Made in the USA I*, 56 F. Supp. 2d at 1320 (arguing that Congressional power under the Foreign Commerce Clause, particularly when the agreement is dominated by foreign commerce provisions, is at least concurrent with the Treaty Clause power).

13. *Id.* at 1323.

14. *Made in the USA II*, 242 F.3d at 1313-14.

15. *Id.*

16. See Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 668 (1989) (arguing that the political question doctrine is incomprehensible because all constitutional issues have broad political aspects and that the function of the judiciary in constitutional cases is political education).

17. See Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?* 106 HARV. L. REV. 1980 (1993) (describing the debate over the political question doctrine as a scholarly perennial that reflects a fundamental contest over the legitimacy and scope of judicial review in a democratic society).

18. See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 108-09 (1988) (explaining that the debate over the political question doctrine grew out of the scholarly arguments about the proper role of judicial review in our constitutional order).

19. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992) (attacking the perception that foreign affairs are "different" and therefore deserving immunity from judicial review).

Specifically, this Comment argues that a correct application of the political question doctrine should not bar judicial review of the issue of whether NAFTA, or any international agreement, is a treaty and whether the Treaty Clause's procedure is the exclusive means for adopting such a treaty. Both the district court as well as the circuit court applied the political question framework enunciated in *Baker v. Carr*²⁰ in reaching its respective decision on the political character of the issue presented, and its corollary justiciability²¹ and nonjusticiability.²² However, the district court's analysis is the more tenable one, whereas the circuit court's is flawed. Part II of this Comment provides the historical background of NAFTA's adoption and presents the issues litigated. Part III examines the circuit court's *Baker* analysis and critiques its approach with respect to each of the *Baker* factors. Part IV considers the justifications underlying the foreign affairs branch of the political question doctrine, in general, and further inquires whether commercial areas of foreign affairs, in particular, warrant more or less insulation from review by the judicial branch. Finally, Part V concludes that the political question exception to judicial review is irrelevant with respect to this controversy. As a result, the circuit court should have ruled on the merits of the issue of whether NAFTA is a treaty, and if so, whether the two-thirds-of-the-Senate requirement in accordance with the Treaty Clause is the sole means of ratifying a treaty.

II. BACKGROUND

A. NAFTA's Legislative History and Adoption

In 1993, Congress passed legislation approving and implementing the free trade Agreement between the United States, Mexico and Canada.²³ The three countries of North America initiated negotiations in 1990 with the intention of forming an ambitious economic alliance encompassing the entire conti-

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

21. *Made in the USA I*, 56 F. Supp. 2d 1226, 1254-63 (N.D. Ala. 1999).

22. *Made in the USA II*, 242 F.3d 1300, 1312-18 (11th Cir. 2001).

23. H.R. REP. NO. 103-361(I), at 8 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2552.

ment.²⁴ The Agreement would accomplish this goal by creating a “free trade zone” through the elimination of tariffs and other trade barriers between the signatories.²⁵ The culmination of two years of negotiations occurred on December 17, 1992, when the leaders of the three countries signed NAFTA. However, an intense political debate over the wisdom of entering into the Agreement ensued and lasted for almost a year, until December 8, 1993, when Congress enacted the North America Free Trade Agreement Implementation Act (“Act”).²⁶

In spite of its label, i.e., the North America Free Trade Agreement Implementation Act,²⁷ the legislation served a dual purpose. In addition to its indicated purpose — i.e., providing a series of laws to implement the provisions of the Agreement within the United States — the legislation also served as the legislative approval²⁸ of the Agreement — i.e., the enactment of the Agreement as binding law of the land.²⁹ This latter purpose is what lies at the heart of the controversy challenging the con-

24. See *id.* at 2558 (NAFTA is “the most comprehensive trade agreement ever negotiated.”).

25. *Made in the USA I*, 56 F. Supp. 2d at 1228.

26. NAFTA Implementation Act, 19 U.S.C. §§ 3301-3473 (1994).

27. Pub. L. No. 103-182, 107 Stat. 2057 (1993).

28. The North America Free Trade Agreement was adopted pursuant to the “fast track” procedure for adopting international agreements. The provisions authorizing the use of the “fast track” were included in Trade Act of 1974, 19 U.S.C. §§ 2101-2495 (1994 & 2001 Supp.) See also Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143 (1992). The fast track procedure permits:

[T]he President to initiate a foreign affairs action, (for example, negotiation of an international trade agreement), but requires him to notify, consult, and subsequently submit the product of that action back to Congress for final, accelerated approval. Under modified House and Senate rules, Congress “promises” the President that it will automatically discharge the completed initiative from committee within a certain number of days, bar floor amendment of the submitted proposal, and limit floor debate, thereby ensuring the President and our trading partners that the submitted legislative package will be voted up or down without alteration within a fixed period of time.

Id. at 143-44. Moreover, the President’s purported power to negotiate and conclude NAFTA was pursuant to his constitutional responsibility for conducting foreign affairs of the United States and in accordance with the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2901-2906 (1994).

29. See *Made in the USA I*, 56 F. Supp. 2d at 1228; NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

stitutionality of the Agreement, namely, that the majority with which the Act passed was a mere vote of 234 to 200 in the House of Representative and sixty-one to thirty-eight in the Senate.³⁰ It thus did not comply with the Treaty Clause,³¹ which mandates an approval by a majority of at least two-thirds of the Senate in order to ratify a treaty.

While the Act necessarily terminated the political debate over the wisdom of the Agreement, the overall struggle had by no means ended. Rather, the vote merely altered the character of the dispute and the fora in which it would take place, for the point of contention now shifted from the political to the legal; i.e., from congressional and presidential debates to the courts. That is, NAFTA's foes, which had heretofore opposed it on policy grounds, claiming that the Agreement would cause the loss of jobs³² and harm the environment,³³ now transformed their argument into a legal issue, claiming that the Agreement, as a treaty, was unconstitutionally adopted because it failed to garner the requisite two-thirds majority of the Senate in contravention of the Treaty Clause.

B. Judicial Treatment and Case History

In 1998, a group of plaintiffs sued the government, seeking a declaration that NAFTA was unconstitutional.³⁴ One group of plaintiffs, the so called "institutional plaintiffs," included Made in the USA Foundation, Inc., a trade group devoted to promot-

30. See 139 CONG. REC. S16, 712-13; JAMES R. HOLBEIN & DONALD J. MUSCH, NAFTA: FINAL TEXT, SUMMARY, LEGISLATIVE HISTORY & IMPLEMENTATION DIRECTORY 1-4 (1994).

31. U.S. CONST. art. II, § 2, cl. 2.

32. See, e.g., 139 CONG. REC. S16, 602-02 (1993) (statement of Sen. Metzenbaum) ("NAFTA guarantees the further exploitation of Mexican workers at the expense of American jobs.").

33. See, e.g., Editorial, *The "Great Debate" over NAFTA*, N.Y. TIMES, Nov. 9, 1993, at A16; *The 1993 Campaign; Transcript of 3d TV Debate Between Bush, Clinton and Perot*, N.Y. TIMES, Oct. 20, 1992, at A20 (At the debate, H. Ross Perot stated: "You implement that Nafta, the Mexican trade agreement, where they pay people \$1 and hour, have no health care, no retirement, no pollution controls, etc., etc., etc., and you're going to hear a giant sucking sound of jobs being pulled out of this country right at the time when we need the tax base to pay the debt, and pay down the interest on the debt and get our house back in order.") (emphasis added).

34. See *Made in the USA I*, 56 F. Supp. 2d at 1229.

ing American-made goods; the United Steelworkers of America; and Local 12L United Steel Workers — the latter are two labor unions representing American workers.³⁵ These plaintiffs contended that the government's failure to abide by the Treaty Clause, which requires the "Advice and Consent" of "two thirds of the Senators present" before a treaty can be ratified,³⁶ renders NAFTA unconstitutional.³⁷

The government countered by arguing, first, that the court lacked jurisdiction to determine the constitutionality of NAFTA because: (1) the plaintiffs have no standing to bring the suit; and (2) the plaintiff's alleged claims present a political question, which is barred from judicial review by the constraints of the political question doctrine.³⁸ The government's second argument was an argument on the merits: it claimed that NAFTA was constitutionally adopted notwithstanding the procedure for treaty ratification that is outlined in the Treaty Clause.³⁹

35. *See id.* Another group, the so-called "voter plaintiffs," consisted of those plaintiffs who brought suit in their individual capacities, claiming that the failure to comply with the Treaty Clause procedures had diluted their Senators' votes, but the court dismissed these claims due to their lack of standing, finding that their claim is nothing more than a generalized grievance. *See id.* at 1235-36. However, the court found that the institutional plaintiffs did have the requisite standing because they alleged injuries — loss of bargaining power and loss of membership — that were "fairly traceable to NAFTA" and because such injuries would likely "be redressed by a favorable decision." *Id.* at 1253.

36. U.S. CONST. art. II, § 2, cl. 2.

37. *Made in the USA I*, 56 F. Supp. 2d at 1229.

38. *Id.*

39. *Id.* The government's primary argument on the merits was that the procedure outlined in the Treaty Clause for ratifying treaties is not "exclusive as to all international agreements." *Id.* at 1317. Consequently, as there are other provisions in the Constitution, such as the Foreign Commerce Clause, that might provide the source of the power to adopt such agreements, NAFTA would be constitutional regardless of the Treaty Clause's mandate. *See id.* Arguably, the government's argument on the merits was in the alternative, for, in addition to its argument against the exclusivity of the Treaty Clause — should the Agreement be ruled a treaty within the meaning of Article II — the government also disputed the plaintiffs' claim that NAFTA is necessarily a Treaty. In this respect, the government's attack was on the plaintiff's test used to determine whether the agreement is a treaty. However, this position is somewhat murky because, by denying the exclusivity of the Treaty Clause, the government seemed to agree that a vote by two thirds of the Senate alone — i.e., the Treaty Clause procedure — would have been an alternative option

1. The District Court's Decision

In a lengthy and remarkably thorough opinion,⁴⁰ the district court found that the institutional plaintiffs had standing⁴¹ and that a review of the issues presented was not barred by the political question doctrine.⁴² Thus, the court decided to review the merits of the case. On the merits, however, the court granted the government's request for summary judgment in holding that the Treaty Clause was not the exclusive manner under which a treaty may be adopted.⁴³ Consequently, since the adoption of the Agreement was a valid exercise of Congress' Foreign Commerce power,⁴⁴ and because such power is plenary,⁴⁵ NAFTA was enacted constitutionally, in spite of the failure to satisfy the Treaty Clause requirements.⁴⁶

to ratify NAFTA, thus effectively agreeing that NAFTA is a treaty as contemplated by Article II. Nevertheless, the court seemed unfazed by this inconsistency by pointing out that since the exclusivity issue will be the decisive factor in determining the constitutionality of NAFTA, the issue of whether it is a treaty in the first place is unimportant when standing alone. *See id.*

40. *See Recent Case, District Court Holds that NAFTA is a Valid Exercise of Foreign Commerce Power*, 113 HARV. L. REV. 1234, 1235 n.9 (2000) (district court's ninety-eight-page opinion substantially incorporates the arguments of both parties to provide a detailed record for reviewing courts); *Made in the USA I*, 56 F. Supp. 2d at 1229 (court lacks finality and any decision will be ephemeral).

41. *Made in the USA I*, 56 F. Supp. 2d at 1253 (The institutional plaintiffs alleged injuries — loss of membership and bargaining power — were “fairly traceable to NAFTA” and “there is substantial likelihood that their injuries would be redressed by a favorable decision.”).

42. *Id.* at 1276.

43. *Id.* at 1317. The district court's ruling on the exclusiveness of the Treaty Clause was harshly criticized as being “in direct contravention of the text of the Constitution, the intent of the framers, and federal court precedent, all three of which collectively prove the exclusivity of the Treaty Clause.” Rachel S. Brass, Note, *Made in the USA Foundation v. United States: NAFTA, the Treaty Clause, and Constitutional Obsolescence*, 9 MINN. J. GLOBAL TRADE 663, 681 (2000). Similarly, the court was criticized for unjustifiably discounting “clear historical evidence that the Framers intended the Treaty Clause to be the exclusive means of ratifying treaties.” *District Court Holds that NAFTA is a Valid Exercise*, *supra* note 40, at 1236.

44. *Made in the USA I*, 56 F. Supp. 2d at 1319-20.

45. *Id.* at 1317.

46. The court drew a distinction between the Treaty Clause's ambiguity and the Foreign Commerce Clause's comparative clarity. Whereas there is no explicit language making the Treaty Clause exclusive as to all international

Generally, when analyzing the political nature of a question before a court in order to determine whether the political question doctrine deprives it of jurisdiction, the court must necessarily take cognizance of the substantive issues of the controversy.⁴⁷ Thus, even though the justiciability inquiry occurs at the preliminary phase of the litigation, there is usually a good preview of the principal issues to follow.⁴⁸ Indeed, the justiciability inquiry may inform the examination of the merits, and vice versa. Consequently, where the court eventually reaches the merits, it may thus appear that there is duplication of effort, as the same issues considered under the rubric of justiciability are reconsidered again when adjudicating on the merits. In *Made in the USA Foundation v. United States*, the district court acknowledged this distinct characteristic of the political question doctrine analysis, and correctly termed it “a necessary evil,”⁴⁹ since the court cannot reach the merits until it is satisfied that it has the proper jurisdiction to do so.⁵⁰

The court also pointed out another unique quality of the political question doctrine: namely, that as an important consequence of a finding of its applicability to given controversy, ju-

agreements, the plenary scope of the (domestic and well as foreign) Commerce Clause is clear. The court also relied on *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), to argue that the Framers intended the foreign commerce power to be broad. See *Made in the USA I*, 56 F. Supp. 2d at 1317.

47. See *Made in the USA I*, 56 F. Supp. 2d at 1255 n.106.

48. This is the result of applying the proper test under the *Baker* framework, as discussed at the text accompanying notes 60 and 127, *infra*. In fact, it is precisely this feature of the political question doctrine that lead critics of the doctrine to deny its very existence. For when the court must look to the substantive arguments to *decide whether to decide*, it is effectively making a decision based on the merits, the only difference is that the decision is made at a preliminary stage under the guise of a jurisdictional — i.e., threshold — issue. See Louise Henkin, *Is there Really a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that the purported application of the doctrine to avoid adjudication is in reality an adjudication of the underlying constitutionality of the alleged act). The divergent conclusions of the district and circuit courts with respect to the political question doctrine in the present case, while both reaching the same substantive result as to the underlying constitutionality of NAFTA’s adoption, would certainly bolster Professor Henkin’s position.

49. *Made in the USA I*, 56 F. Supp. 2d at 1255.

50. *Id.* Furthermore, in the district court’s exhaustive application of the *Baker* analytical framework, this feature emerges quite apparently and helps illuminate the central issues on the merits that are discussed latterly.

dicial review will be barred absolutely.⁵¹ For example, the other restrictions on judicial review emanating from the case-or-controversy requirement of Article III, such as standing, ripeness and mootness, may be cured by altering the factual circumstances, e.g., presenting the issue at a different point in time, or by different plaintiffs.⁵² No such relief is possible, however, when a question is declared nonjusticiable due to its political nature. In the latter case, therefore, the foreclosure of judicial scrutiny is in absolute terms.⁵³

The court then proceeded to outline the *Baker v. Carr* criteria for analyzing whether the controversy at bar presents a nonjusticiable political question.⁵⁴ In *Baker*, the Supreme Court itemized the oft-quoted six-factor analytical framework that courts should apply in determining whether a case is nonjusticiable:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵⁵

This six-factor framework was subsequently condensed into a three-part inquiry in *Goldwater v. Carter*, as follows: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential consid-

51. *Id.* at 1254.

52. *See id.*

53. *Id.* (quoting 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 2.16 (2d ed. 1992)).

54. *Made in the USA I*, 56 F. Supp. 2d at 1254.

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

erations counsel against judicial intervention?"⁵⁶ Because the parties in *Made in the USA Foundation* used this streamlined version of the political question analysis,⁵⁷ and because the shorter version incorporates all the *Baker* criteria without abridging them,⁵⁸ both the district court as well as the circuit court employed the three *Goldwater* inquiries in analyzing the political question issue in the present case.⁵⁹

a. Textual Commitment

The government's primary argument on the textual commitment prong was that the text of the Constitution conferred on the President and Congress vast powers in the areas of foreign affairs and foreign commerce.⁶⁰ The government thus pointed to the various textually enumerated powers of the President in the area of foreign affairs, such as his role as Chief Executive,⁶¹ and Commander in Chief.⁶² Furthermore, the President has the power to "make Treaties" with the consent of two-thirds of the Senate present,⁶³ to "appoint Ambassadors and Consuls"⁶⁴ and to receive ambassadors and other public ministers.⁶⁵ Similarly, Congress' textually enumerated powers in the realm of foreign affairs include the power to declare war,⁶⁶ the power to regulate commerce with foreign nations,⁶⁷ as well as the Senate's role in the treaty-making process under the Treaty Clause.⁶⁸

Because the grants of these powers to the President and Congress are textually self-evident and therefore indisputable, the parties' contentions must essentially center on the scope of these powers; i.e., whether such powers are subject to any con-

56. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

57. *Made in the USA I*, 56 F. Supp. 2d at 1255.

58. *Made in the USA II*, 242 F.3d 1300, 1312 (11th Cir. 2001).

59. *See id.*; *Made in the USA I*, 56 F. Supp. 2d at 1255.

60. *Made in the USA I*, 56 F. Supp. 2d at 1255.

61. U.S. CONST. art. II, § 1, cl. 1.

62. *Id.* art. II, § 2, cl. 1.

63. *Id.* art. II, § 2, cl. 2.

64. *Id.*

65. *Id.* art. II, § 3. *See also Made in the USA I*, 56 F. Supp. 2d at 1255.

66. U.S. CONST. art. I, § 8, cl. 11.

67. *Id.* art. I, § 8, cl. 3.

68. *Id.* art. II, § 2, cl. 2. *See also Made in the USA I*, 56 F. Supp. 2d at 1255.

stitutional constraints, or whether these powers are absolute.⁶⁹ Thus, the plaintiffs argued that the political branches could not construe their textually committed power as a grant of unfretted authority in breach of constitutional bounds on such power.⁷⁰ In particular, since the Constitution provides for a treaty-making process in the Treaty Clause, that process must be followed whenever a treaty is ratified.⁷¹ The political branches cannot claim that their constitutionally enumerated authority with respect to foreign affairs and treaty making allows them to use an alternative means for ratifying treaties in violation of the Treaty Clause.⁷²

The district court, in fact, found the plaintiffs' argument more persuasive.⁷³ In spite of the government's attempt to interpret the enumerated powers of the President and Congress as boundless grants of authority,⁷⁴ the court characterized the question as an inquiry into whether the political branches have "chosen a constitutionally permissible means of implementing [their enumerated] power."⁷⁵ Since the Treaty Clause requires

69. *Made in the USA I*, 56 F. Supp. 2d at 1257 ("[P]laintiffs do not contest the government's assertion that the political branches have substantial authority over foreign affairs and commerce.").

70. *Id.* at 1258.

71. *Id.* at 1278 n.211.

72. *Id.*

73. *See id.* at 1276.

74. *Id.* at 1256 (stating that according to the government, neither the political branches nor the courts have ever recognized limitations on the foreign commerce power).

75. *Made in the USA I*, 56 F. Supp. 2d at 1257 (quoting *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 940-41 (1983)) (holding that although Congress has plenary power to legislate in the area of immigration, that power was subject to limitations included in the text of the Constitution). Accordingly, the Supreme Court found unconstitutional a statutory provision that provided for a one-house veto power over executive department decisions, since such procedure fails to comply with the Presentment Clause's requirement of bicameral passage by majority vote and presentment to the President of any act deemed legislative. *Chadha*, 462 U.S. at 956-58. Furthermore, the judicial branch must determine whether a congressional act violates the Constitution. *See Made in the USA I*, 56 F. Supp. 2d at 1276-78 (court is particularly persuaded by *Chadha*).

The court also found *Powell v. McCormack*, 395 U.S. 486 (1969) persuasive on the textually committed prong of the political question inquiry. In *Powell*, the Supreme Court found that Article I, section 5 represents a textually demonstrable commitment to Congress to judge the qualifications of its

a specific process for ratifying treaties, the political branches cannot have the discretion as to what procedure to use, for that would render the constitutional provision a dead letter.⁷⁶ Furthermore, if the courts can determine the constitutionality of substantive provision of a treaty, they should be entitled to determine the constitutionality of the procedures used to adopt such treaties.⁷⁷ Obviously, where the Constitution mandates a given procedure for the exercise of a given power, the judiciary, in its role as sole and supreme interpreter of its provisions, must assure that the political branches adhere to such mandate.⁷⁸

b. Judicial Standards

The government also argued that standards are lacking for a judicial decision as to whether a particular international agreement's approval must comply with the Treaty Clause procedure.⁷⁹ This argument centers upon the constitutional text — i.e., the word “treaties” in the Treaty Clause as well as the Compacts Clause.⁸⁰ The government contended that because

Members, and is therefore not subject to judicial review. However, such decisions are limited to the express qualifications outlined in the Constitution — i.e., age and citizenship. See U.S. CONST. art. I, § 2, cl. 2. Thus, were Congress to decide upon qualifications that are not included in the text, such decision would certainly be subject to judicial review. Otherwise, Congress' power would amount to an effective nullification of the Constitution's requirement of a two-thirds majority vote for expulsion under Article I, section 5, clause 2, since Congress would be able to affect a Member's expulsion under the pretense of judging the Member's qualifications. See *Powell*, 395 U.S. at 547-48; *Made in the USA I*, 56 F. Supp. 2d at 1278 n.211 (explaining that this case is similar to *Powell* with respect to the possibly of nullifying the Treaty Clause, if it is determined that the Clause's procedures are exclusive).

76. See *Made in the USA I*, 56 F. Supp. 2d at 1278 n.211.

77. *Id.* at 1256, 1278, citing *Reid v. Covert*, 354 U.S. 1, 14, 17 (1957) (recognizing that foreign commitments cannot relieve the government from its obligation to operate within the limits imposed by the Constitution, and that the prohibitions of the Constitution cannot be nullified by the President or by the President and the Senate combined).

78. See *Made in the USA I*, 56 F. Supp. 2d at 1276 n.210; Michael J. Glannon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 820 (1989) (arguing that judicial nonintervention in foreign-affairs disputes between Congress and the President poses a fundamental threat to the separation of powers).

79. See *Made in the USA I*, 56 F. Supp. 2d at 1258.

80. *Id.* at 1260.

the term "treaties" is undefined in the text, and because the text fails to delineate between treaties and the other international agreements it mentions, there can be no applicable standards to resolve this case, in which the pivotal question is whether the agreement is, or is not, a treaty.⁸¹ Further, the Constitution does not address the procedures for adopting agreements that are not treaties, and does not explicitly mandate that treaties are the exclusive means of making agreements between the federal government and foreign powers or that the Treaty Clause procedure is the exclusive method of ratifying treaties.⁸² Thus, the lack of definition as well as the silence on the exclusivity and alternatives with respect to the making of international agreements suggests that there can be no legal standards dealing with the process of adopting such agreements.

Judicial precedent, according to government, supports the corollary that a lack of specificity within the constitutional text results in a lack of judicially manageable standards.⁸³ For example, a plurality of the Supreme Court held that a congressional challenge of the President's unilateral termination of a treaty was nonjusticiable because the Constitution fails to provide guidance on the issue.⁸⁴ Thus, the opinion contrasted the making of a treaty with the abrogation of a treaty. While the process for the former is clearly outlined in the Treaty Clause, no mention is made of the process for the latter. The opinion therefore concluded that no standards exist for a judicial determination of what is the proper procedure for the termination of a treaty.⁸⁵ Similarly, the Supreme Court found that a claim challenging Congress' impeachment procedures was not justiciable since the Impeachment Clause⁸⁶ fails to identify the proper process by which to try impeachments.⁸⁷ The absence of

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

85. *Id.* Justice Rehnquist also noted that, in addition to the absence of any constitutional provision governing the termination a treaty, different termination procedures may be appropriate for different treaties. *Id.*

86. U.S. CONST. art. I, § 3, cl. 6.

87. *See* *Nixon v. United States*, 506 U.S. 224, 236-38 (1993).

a textually mandated impeachment process, and the lack of any textual limits upon the legislative branch's discretion in dictating impeachment procedures, deprives the judiciary of the standards necessary for determining the constitutionality of such process.⁸⁸ Other than stating the undefined term "treaty," the Treaty Clause similarly fails to outline under which circumstances its procedure must be followed, the government argued.⁸⁹ Consequently, the present case was nonjusticiable due to the lack of judicially manageable standards.

The plaintiffs countered that the lack of a definition for the term "treaty" within the Constitution's text cannot confer upon the political branches unfretted discretion to determine whether a particular agreement constitutes a treaty requiring the Treaty Clause's procedure for its adoption.⁹⁰ Supreme Court precedence, according to plaintiffs, consistently adjudicated claims that called for the interpretation of provisions in which the Constitution failed to provide clear guidance.⁹¹ For example, the Court ruled on the applicability of the Presentment Clause⁹² to congressional action, in spite of the Constitution's failure to specify exactly what constitutes legislative action requiring adherence to the bicameralism and presentment requirements.⁹³ Similarly, although the Origination Clause⁹⁴ provides no definition or guidance as to what kind of bill amounts to a "bill for raising revenue," the Court ruled on the

88. *Id.* The Court distinguished *Nixon* from *Powell* in which it held that the judiciary may review the House of Representative's finding as to a Member's qualification. The contrast between *Nixon* and *Powell* is evident in the constitutional constraints, which are absent in the former but present in the latter. Whereas the Constitution makes no mention whatsoever of the process by which the Senate is to try impeachments, it specifically addresses House membership qualification — i.e., the age, citizenship and residency requirements of Article I, section 2, clause 2. Consequently, the House's authority to judge the qualifications of its own Members under Article I, section 5, clause 1 is textually limited to those qualifications of section 2, clause 2. See *Made in the USA I*, 56 F. Supp. 2d at 1260.

89. *Made in the USA I*, 56 F. Supp. 2d at 1261.

90. *Id.*

91. *Id.*

92. U.S. CONST. art. I, § 7, cl. 2.

93. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 981 (1983).

94. U.S. CONST. art. I, § 7, cl. 1.

merits of the claim.⁹⁵ In rejecting the contention that a lack of clear guidance in the text suggests a lack of judicial standards, the Court listed the many provisions in Constitution whose interpretation required the judiciary to develop legal standards in the absence of textually defined standards.⁹⁶ Finally, the Court was able to determine whether an official falls within the meaning of the term "inferior officer" of the Appointment Clause,⁹⁷ even though the "line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance as to where it should be drawn."⁹⁸

The plaintiffs also contended that the cases cited by the government are inapposite to the present case. First, *Goldwater* involves the termination of a treaty as opposed to its adoption, and, as previously pointed out, the Constitution only mandates a process for adopting a treaty but is entirely silent as to the process for termination of a treaty.⁹⁹ Moreover, even with respect to the termination of a treaty, only four justices expressly agreed that the issue presents a nonjusticiable political question.¹⁰⁰ Second, the Impeachment Clause at issue in *Nixon v. United States*¹⁰¹ explicitly provides that the "Senate shall have the sole power to try all Impeachments."¹⁰² Thus, the Constitu-

95. See *United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990).

96. The Supreme Court stated:

To be sure, the courts must develop standards for making [such] determinations, but the [g]overnment suggests no reason that developing such standards will be more difficult in this context than in any other. Surely a judicial system capable of determining when punishment is "cruel and unusual," when bail is "[e]xcessive," when searches are "unreasonable," and when congressional action is "necessary and proper" for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges.

Id.

97. U.S. CONST. art. II, § 2, cl. 2.

98. *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

99. See *Made in the USA I*, 56 F. Supp. 2d 1226, 1262 n.144 (N.D. Ala. 1999), citing *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

100. *Made in the USA I*, 56 F. Supp. 2d at 1262.

101. *Nixon v. United States*, 506 U.S. 224 (1993).

102. U.S. CONST. art. I, § 3, cl. 6. See also *Made in the USA I*, 56 F. Supp. 2d at 1262. The plaintiffs pointed out that the reason for finding the question nonjusticiable was not that the Supreme Court found the Impeachment

tion vested the power of determining the process of such trial solely in the Senate, and as a consequence, a challenge of the constitutionality of such process cannot be justiciable.¹⁰³

The district court found plaintiffs' argument more persuasive, holding that the question of whether a particular agreement amounts to a treaty and whether the Treaty Clause's procedure is the exclusive means of adopting such a treaty are legal issues subject to judicial review and interpretation.¹⁰⁴ That the constitutional provision at issue is undefined is no deterrent against judicial review, for it is standard judicial practice

Clause ambiguous with regard to the meaning of the term "try." Rather, the plaintiffs argued, based on pages 229-36 of the *Nixon* decision, that the Court concluded that the question of the trial's procedures is nonjusticiable because it found that the Framers made a considered judgment to vest in the Senate the sole power to try impeachments. *See id.* This result is buttressed by the fact that the Clause contains three express procedural safeguards; i.e., that the Senators be under oath, that two-thirds of the Senate vote to convict and that the Chief Justice preside over any impeachment of the President. *See id.* Thus, should a claim be made that the Senate did not adhere to these express provisions — i.e., in direct analogy to the claim here — the Court would not be hesitant about whether to adjudicate the question. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 548-49 (1969) (refusing to permit the House to "exclude" a Member because it did not adhere to the two-thirds requirement of Article I, section 5). *See also supra* note 75 and discussion.

The plaintiffs further distinguished *Nixon* from the present case by pointing out that the Court expressly recognized in *Nixon* that a finding of nonjusticiability there would not permit the Senate to defeat any separate provision of the Constitution. *See Made in the USA I*, 56 F. Supp. 2d at 1262; *Nixon*, 506 U.S. at 237. Conversely, as in *Powell*, a finding of nonjusticiability there in the present case would render the Treaty Clause void, for the court would never be able to reach the merits of a constitutional challenge based upon the Clause.

The government responded by pointing out that *Powell* as well as *Chadha* involved situations where the claim was that Congress arguably transgressed specific textual limits. *See Powell*, 395 U.S. at 521; *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 942 (1983). Conversely, in the present case, Congress' authority is grounded upon the Foreign Commerce Clause, which is not subject to any limitation — unlike the Impeachment Clause and the Qualifications Clause. *See Made in the USA I*, 56 F. Supp. 2d at 1262 n.143. However, this argument is flawed. For while the Foreign Commerce Clause contains no limitations per se, construing the powers under it as grants of unbridled powers — i.e., immunizing them from judicial review — would defeat a separate provision of the Constitution, as it would effectively render the Treaty Clause a dead letter.

103. *See Made in the USA I*, 56 F. Supp. 2d at 1262.

104. *Id.* at 1276-78.

to interpret vague constitutional texts.¹⁰⁵ In fact, that is the essence of the judicial function — announcement of the law, whether by interpreting ambiguous or vague texts or otherwise.¹⁰⁶ Further, the court concluded that judicially discoverable and manageable standards do exist to determine these issues.¹⁰⁷

c. Prudential Considerations

The government's argument with respect to the prudential concerns prong of the political question doctrine entails a multithreaded analysis. In all, the government identified four distinct factors in the present case that ought to counsel against the suitability of judicially reviewing the controversy here.¹⁰⁸ They are: (1) the necessity of federal uniformity; (2) the potential effect of an adverse judicial decision on the nation's economy and foreign relations; (3) the reliance of governments and businesses on the positive aspects of NAFTA; and (4) the respect courts should pay to coordinate branches of the federal government.¹⁰⁹

The Supreme Court recognized that in the area of foreign affairs, it is important for the branches of the federal government to speak with one voice.¹¹⁰ Further, the Court observed that "federal uniformity is essential" in the area of foreign commerce.¹¹¹ According to the government, a judicial decision invalidating NAFTA on constitutional grounds would clearly disturb this principle of federal uniformity in the area of foreign commerce.¹¹² The plaintiffs countered, however, that in spite of the legitimate interest of having the government speak with

105. *Id.*

106. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (the implication of "interpreting the law" is the need for clarification of otherwise vague or ambiguous terms).

107. *Made in the USA I*, 56 F. Supp. 2d at 1276-78 (The court stated, "All these issues involve constitutional interpretation just as do issues involving the intent and scope of the First, Fourth and Fourteenth Amendments, etc. The difficulty of decision does not change the nature of the issue.").

108. *Id.* at 1266.

109. *Id.*

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

111. *Made in the USA I*, 56 F. Supp. 2d at 1267 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 444 U.S. 434, 448 (1979)).

112. *See* *Made in the USA I*, 56 F. Supp. 2d at 1267.

one voice, that concern cannot dictate the Treaty Clause analysis because the Clause specifically requires two distinct voices — i.e., the Senate's and the President's.¹¹³ Moreover, if those voices authorized in the Constitution are not all heard, because the mandated procedure was not followed, then the government in fact speaks with less than its full voice.¹¹⁴

The government further contended that a judicial declaration that NAFTA is unconstitutional would undermine every other major international trade agreement made in the past twenty to thirty years.¹¹⁵ Consequently, it would deal a profound setback for the nation's economic growth and its ability to deal with foreign powers.¹¹⁶ Moreover, because the governments, businesses and citizens of the U. S., Mexico and Canada have conducted their business affairs in reliance on the benefits of NAFTA, an adverse ruling would have a destabilizing effect in all three countries.¹¹⁷ Therefore, the circumstances demonstrate "an unusual need for unquestioning adherence to a political decision already made."¹¹⁸

Finally, the government argued, judicial review of the process by which the political branches enter into international agreements would violate the respect due coordinate branches

113. *See id.* Arguably, the Treaty Clause's requirement of the two voices is consistent with the one-voice theory because the Clause's requirements are specifically for, and hence *before*, the adoption of treaties. Thus, when its procedures are followed and a treaty is adopted thereby, it is then that the government's voice first speaks as such, and by then it is with one voice, as opposed to, for example, during deliberations before the adoption.

114. *See id.* Evidently, less than a full voice is just as damaging than multifarious voices, the former suggesting instability and disorder in government, and the latter indicating a less than full democratic process.

115. *Id.* at 1268-67. Moreover:

[T]he President stated that "[c]ooperation between the administration and Congress on a bipartisan basis has been critical in our efforts to reduce the deficit, to conclude trade agreements that level the global level playing field for America, to secure peace and prosperity along America's borders and to help prepare all Americans to benefit from expanded economic opportunities."

Id. at 1268 (quoting President's Message to Congress Transmitting the Study on the Operation and Effect of the North America Free Trade Agreement, 33 WEEKLY COMP. PRES. DOC. 1054 (July 11, 1997)).

116. *See id.*

117. *See Made in the USA I*, 56 F. Supp. 2d at 1268.

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

of government.¹¹⁹ This proposition is supported by the two concurring opinions in *Goldwater*, which held that the judiciary should not decide the constitutionality of the approval process of an agreement where the political branches cooperated to conclude such an agreement.¹²⁰ Since the Senate has not insisted on its alleged right to approve NAFTA in accordance with the Treaty Clause, the court should defer to the decisions of the coordinate branches of government.¹²¹ The plaintiffs refuted this argument by simply stating that under our system of government, federal courts will occasionally "interpret the Constitution in a manner" that is inconsistent with the actions of the political branches.¹²² Such conflict "cannot justify the courts' avoiding their constitutional responsibility."¹²³

The district court accepted the plaintiffs' response on this issue, holding that respect for coordinate branches is no more an issue than it is in many other contexts.¹²⁴ Furthermore, the court found that there is no unusual need for unquestioning

119. See *Made in the USA I*, 56 F. Supp. 2d at 1268.

120. See *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring). Similarly, Justice Rehnquist stated that the judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach an impasse. *Id.* at 1005 n.1.

121. See *Made in the USA I*, 56 F. Supp. 2d at 1268. The government further cited Justice Powell's concurrence in *Goldwater* for the proposition that when the Senate sees no reason to contest the President's decision to submit an agreement to the whole Congress, it is not the court's "task to do so." *Goldwater*, 444 U.S. at 995 (Powell, J., concurring).

The plaintiffs point out, however, that this argument is unsound. Assuming, *arguendo*, that the constitutional requirement of a supermajority was intentionally crafted to protect minority interests, there is no reason to expect that the majority of Congress or the President would raise objections to the elimination of such protection. Therefore, the fact that Congress and the President have mutually agreed to implement the fast-track procedure and ignore the Treaty Clause's requirements does not legitimize the practice. On the contrary, it illustrates why the Clause's protections were needed in the first place — i.e., to avoid (simple) majority control over the creation of treaties. See *Made in the USA I*, 56 F. Supp. 2d at 1269. Support for this supposition regarding the Framers' intent for requiring the supermajority is a matter to be argued on the merits. For the extensive treatment of the intent/history of the Treaty Clause in the district court's opinion, see *id.* at 1300-32.

122. *Made in the USA I*, 56 F. Supp. 2d at 1269 (citing *Powell v. McCormack*, 395 U.S. 486, 548 (1969)).

123. *Powell*, 395 U.S. at 548.

124. *Made in the USA I*, 56 F. Supp. 2d at 1278.

adherence to political decisions, which arguably violate the Constitution, and that there has been no specific announcement¹²⁵ by the political branches related to the application of the Treaty Clause, which might cause embarrassment.¹²⁶ Finally, the court boldly stated that it could not perceive of any prudential considerations that might caution against judicial intervention.¹²⁷

2. The Eleventh Circuit's Decision

As indicated, the circuit court reversed the district court's holding with respect to the justiciability issue.¹²⁸ Finding that the case presents a nonjusticiable political question, the circuit court dismissed the complaint.¹²⁹ Remarkably, the court found each of the *Goldwater* factors cutting in the government's favor — i.e., favoring preclusion of the case from judicial review due to the political nature of the issues involved.¹³⁰ The court underscored that the elements of the *Baker/Goldwater* framework are disjunctive and therefore finding even one element applicable in a particular case may suffice to render that case nonjusticiable. Nevertheless, it proceeded to analyze and conclude that all such factors point toward a finding of nonjusticiability.¹³¹

The circuit court's analysis, however, is less persuasive than that of the district court, and not merely because it is shorter.¹³²

125. With respect to the multifarious-voices thread of the prudential-considerations prong, the government's contention was that the mere adoption of NAFTA in the challenged manner entails an effective announcement by the political branches that its adoption was constitutional. Arguably, this is the common understanding of the multifarious-voices analysis and the more plausible one. It would be odd to insist that "unquestioning adherence" to avoid embarrassing the political branches is only applicable when such branches enunciated Constitutional holdings. Quite to the contrary, due respect to the coordinate branches is properly invoked *only* in the case of these branches' *policy determination*. See *id.* at n.210.

126. *Id.*

127. *Id.*

128. *Made in the USA II*, 242 F.3d 1300, 1302 (11th Cir. 2001).

129. *Id.*

130. *Id.* at 1312 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

131. *Made in the USA II*, 242 F.3d at 1312-18.

132. While the district court's opinion is remarkably long, at almost 100 pages, the circuit court's is less than twenty. But, of course, mere length cannot have a bearing on the quality of the analysis, for indeed, "brevity is

Conceivably, though, the circuit court's decision might be justified as being result-oriented, motivated by the prudential concerns discussed in its justiciability analysis.¹³³ Nevertheless, it would seem more principled to assert the judiciary's role, rather than practice restraint — particularly where, as here, choosing the former path would not affect the outcome.¹³⁴ What follows is a discussion of the court's analysis and a critique of its reasoning with respect to each of the *Goldwater* factors.

III. THE CIRCUIT COURT'S *BAKER* ANALYSIS

A. *Textual Commitment*

The circuit court concluded that the Constitution's text committed to the political branches the discretion to choose which procedures to employ for the adoption of any given international, commercial agreement.¹³⁵ Consequently, in the case of such an agreement, the constitutionality of the adapting procedures is a nonjusticiable issue. In support for this holding, the court used a bifurcated approach. First, the court recited the constitutional provisions¹³⁶ that indicate broad grants of au-

the soul of wit." WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK*, act 2, sc. 2. Furthermore, the lower court intentionally created an extensive record to assist the reviewing courts. See discussion *supra* note 40. Despite its length, and thoroughness, moreover, one commentator characterized the district court's opinion as "long but hesitant." *District Court Holds that NAFTA is a Valid Exercise*, *supra* note 40, at 1235. See also Alan S. Lederman, *Eleventh Circuit Declines to Rewrite 20th Century World History*, 75 FLA. B.J. 30, 34 (2001) (The district court's "rather weakly justified concluding passages leave much to be desired.").

133. See *Made in the USA II*, 242 F.3d at 1317-19. See generally FRANCK, *supra* note 19; Lederman, *supra* note 132, at 36 (conceding that the circuit court's approach is technically dubious, but defending it as preferable to the district court's heavily criticized ruling on the merits).

134. See generally FRANCK, *supra* note 19; ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); but cf. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1984). See also commentators cited *supra* notes 16-18.

135. *Made in the USA II*, 242 F.3d at 1311.

136. These powers include the President's role as Chief Executive under Article II, section 1, clause 1, and as Commander in Chief, under Article III, section 2, clause 1. Additionally, the President has the power to "make Treaties," albeit only with the advice and consent of two-thirds of the Senate, as

thority to the political branches in the areas of foreign affairs and foreign commerce.¹³⁷ Next, the court reasoned that as a consequence of these textually enumerated powers, the political branches' actions in the sphere of foreign affairs must necessarily be protected from judicial review.¹³⁸ This two-step analysis is essential because the mere granting of particular functions, powers and authorities to governmental branches cannot be tantamount to the granting of unfettered discretion to those branches in the exercise of such functions, powers and authorities, especially when the Constitution itself mandates compliance with specific procedure with respect to such function, powers and authorities.¹³⁹ Thus, simply because the political branches are textually granted vast powers in regards to foreign affairs, it cannot mean that they can ignore the constitutional requirement of a supermajority of the Senate for adopting treaties.¹⁴⁰

Apparently, realizing this weakness in its analysis, the circuit court resorted to a plethora of Supreme Court precedents

well as "appoint Ambassadors . . . and Consuls," under Article II, section 2, clause 2, and receive "Ambassadors and other public Ministers," under Article II, section 3. See *supra* text accompanying notes 60-72.

In a similar vein, the court listed the constitutional provisions that confer analogous powers to Congress in the area of foreign affairs, including the power "to declare war," under Article I, section 8, clause 11; "to raise armies," under clause 12; and "to provide and maintain a navy," under clause 13. And with regard to its foreign commerce powers, the court added that it is "most significant[]" that the Constitution also confers on the entire Congress — not just the Senate, as in the case of treaty ratification — the authority "to regulate commerce with foreign nations," under clause 3.

137. *Made in the USA II*, 242 F.3d at 1313-14.

138. *Id.*

139. This proposition is so axiomatic as to obviate the need for citations. But as eminent an authority as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), should suffice for supporting it. After all, it is the Executive's function to execute the laws that Congress, functioning as Legislature, has enacted. It would be perverse in the extreme to argue that by virtue of the textually enumerated functions of these branches, they should have unreviewable discretion in performing them, even in contravention of express constitutional provisions. See, e.g., *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 940-41 (1983) (Regardless of a branch's plenary power over a particular subject matter, the Court has final reviewing authority to determine whether that branch "has chosen a constitutionally permissible means of implementing that power.").

140. See U.S. CONST. art. II, § 2, cl. 2.

that indicate that the political branches' powers in the realm of foreign affairs are uniquely broad-based and exclusive.¹⁴¹ And as a consequence, in matters relating to foreign affairs, the political branches' discretion is "largely immune from judicial inquiry or interference."¹⁴² The court thus suggested that these cases serve to bridge the gap between the textual grants of power and the purported corollary that the exercise of such power is unreviewable. However, for a variety of reasons, this conclusion is tenuous at best.

First, the Supreme Court merely spoke with respect to policy decisions by the political branches.¹⁴³ Thus, by virtue of the Constitution's grants of broad and exclusive authorities in the area of foreign relations to the political branches, the judiciary is precluded from adjudging the wisdom of policies adopted by those branches in those areas. However, from the broad protections afforded the political branches' policy decisions, it does not necessarily follow that their methods in adopting or executing such policies are likewise absolutely protected.¹⁴⁴ Rather, where such methods are challenged as being in violation of express constitutional requirements, it is the "duty of the judicial department to say what the law is."¹⁴⁵

141. See, e.g., *Ludeck v. Watkins*, 335 U.S. 160, 173 (1948) (stating that President is the nation's "guiding organ" in foreign affairs); *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) (stating that foreign policy is the province of the Executive); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (stating that political branches have power to conclude agreements that are not treaties in the constitutional sense).

142. *Made in the USA II*, 242 F.3d at 1314 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

143. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (making reference to "initial policy determinations").

144. In this sense, the Supreme Court's precedent does not illuminate the original difficulty in the circuit court's reasoning, i.e., that a mere grant of textual powers does not necessarily equal immunity from judicial review. For the Court's holdings with regard to the broad scope of the policy powers of the political branches in the arena of foreign affairs only establishes that the subject matter is unique and that for a number of understandable justifications, the political branches must be allowed some leeway, which may not be available in the context of domestic affairs. However, that still says nothing about the political branches' ability to violate the Constitution under the guise of their admitted textually-granted broad-based foreign affairs powers.

145. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Second, in many of the cases relied upon by the circuit court, the Supreme Court simply addressed itself to the practical rationales underlying the Constitution's grant of such vast powers to the political branches. Thus, the Court recognized that the President is the nation's "guiding organ in the conduct of our foreign affairs,"¹⁴⁶ in whom the Constitution vests "vast powers in relation to the outside world,"¹⁴⁷ due to obvious practical concerns.¹⁴⁸ Therefore, while these concerns are valid, it is rather far fetched to suggest that such concerns amount to a textual commitment per se. Instead, the opposite is true. For, while it is possible to explain a clearly demonstrable textual commitment to a political branch as stemming from a prudential concern, such a concern cannot by itself indicate a textual grant of unreviewable power to such branches.¹⁴⁹

Finally, the Supreme Court itself, apparently recognizing the pitfalls potentially arising from extending the political branches' foreign affairs powers to far, admonished in *Baker* that it would be "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁵⁰ The Court also expressly held that the existence of "foreign commitments" could not relieve the government of its obligation to "operate within the bounds laid down by the Constitution."¹⁵¹ Consequently, the Supreme Court's opinions cited by the circuit court are unhelpful for the proposition that because the issue in this case involves foreign relations, it is thereby rendered nonjusticiable. Acknowledging that much, the circuit court stated that it has "little doubt" that courts have a duty to adjudicate such issues.¹⁵²

Nevertheless, the court insisted that this case is nonjusticiable for it also involves a commercial agreement.¹⁵³ Thus, be-

146. *Ludeck*, 335 U.S. at 173.

147. *Id.*

148. See *Baker*, 369 U.S. at 211; *Japan Line, Ltd. v. County of Los Angeles*, 444 U.S. 434, 448 (1979); *Michelin Tire Corp. v. Comm'r*, 423 U.S. 276, 285 (1976).

149. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

150. *Baker*, 369 U.S. at 211.

151. *Reid v. Covert*, 354 U.S. 1, 14, 17 (1957).

152. *Made in the USA II*, 242 F.3d 1300, 1314 (11th Cir. 2001).

153. *Id.*

cause it is not merely a foreign affairs matter, but also a commercial matter, the Constitution's demonstrable assignment of authority to the political branches over the nation's foreign affairs and commerce¹⁵⁴ must counsel against the judiciary's intruding role in overseeing the President and Congress in such matters.¹⁵⁵ However, the court fails to explain why commercial matters — or even commercial and foreign affairs matters in combination — deserve more deference than mere foreign affairs matters. Therefore, if, as the Supreme Court cautioned, in exercising its foreign affairs powers, the government cannot relieve itself from abiding by constitutional limits,¹⁵⁶ the same must be true of the political branches' commercial, or commercial and foreign affairs when combined, powers. Consequently, the constitutionality of the adoption procedures of an international agreement, even a commercial one, is matter properly within the judicial purview.

B. Judicially Manageable Standards

The district court also found that no judicially manageable standards exist for determining whether a given international, commercial agreement constitutes a treaty to require approval pursuant to the Treaty Clause's procedure.¹⁵⁷ Therefore, the constitutional challenge upon NAFTA's adoption procedures presents a nonjusticiable political question. Mustering support for its holding, the court relied heavily on *Goldwater*, where a plurality of the Supreme Court held that judicial standards are absent to decide what procedures must be followed for the abrogation of a treaty.¹⁵⁸ The court seemed to have seized on the plurality's explanation that in the absence of constitutionally mandated procedures, the process must be governed by political standards.¹⁵⁹ Accordingly, in the present case, since there are no legal standards to decide when an agreement must com-

154. That is, the President's foreign affairs powers and the Congress' roles and powers in foreign affairs matters as well as its foreign commerce power. See U.S. CONST. art. I, § 8, cl. 3.

155. See *Made in the USA II*, 242 F.3d at 1314.

156. See *Reid*, 354 U.S. at 14, 17.

157. See *Made in the USA II*, 242 F.3d at 1314.

158. See *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

159. *Id.*

ply with the Treaty Clause, the process is likewise to be governed by the political branches.¹⁶⁰

The present case, however, is distinguishable from *Goldwater* in one important respect. Namely, here the Constitution clearly mandates a process for the adoption of a Treaty, whereas it is completely silent concerning the abrogation of a Treaty.¹⁶¹ Indeed, the Supreme Court plurality opinion in *Goldwater* stresses this distinction as support for its reasoning that the latter issue, as apparently contrasted from the former, presents a nonjusticiable question.¹⁶² To overcome this difficulty, the circuit court, while acknowledging that *Goldwater* may not be controlling here, maintains that it is nevertheless instructive to the present case because the constitutional provision at issue here — i.e., the Treaty Clause — fails to “provide an identifiable textual limit on the authority granted by the Constitution.”¹⁶³

The circuit court thus reasoned that because the Constitution does not explicitly state at which point, or what factors to consider in determining whether an agreement has risen to the level of a “treaty”¹⁶⁴ — requiring adherence to the Treaty Clause’s procedure — such question is nonjusticiable due to the lack of judicial standards.¹⁶⁵ Effectively, the court equates an undefined term in the Constitution — i.e., “Treaty” — with complete silence, as in the abrogation context, suggesting that in both scenarios the courts lack the necessary yardstick to re-

160. See *Made in the USA II*, 242 F.3d at 1315.

161. See *Goldwater*, 444 U.S. at 1003.

162. *Id.* This may perhaps imply that a constitutional challenge, as here, of the procedures employed in adopting a treaty *is*, conversely, indeed justiciable.

163. *Made in the USA II*, 242 F.3d at 1315.

164. Because the Constitution uses different types of international arrangements, such as “agreements and compacts,” in the Compacts Clause, Article I, section 10, clause 3, and “Treaties” in the Treaty Clause, Article II, section 2, clause 2, and makes only the latter subject to stricter adoption requirements, the difference between such arrangements must presumably be one of degree. Thus, treaties are agreements of more significance than the other types of international arrangements. See *id.* at 1315-16. Although the circuit court rejects the possibility of judicially determining the line between such arrangements that are agreements or compacts and those that are treaties, it implicitly accepts the distinction to be one of degree.

165. *Id.*

solve the legal issues presented, and both are therefore nonjusticiable questions.¹⁶⁶

This analysis, however, flies in the face of a myriad of Supreme Court decisions construing and developing necessary standards for undefined terms, as the Constitution is replete with such terms. Likewise, unfazed by a lack of textually identifiable limits, the Court consistently decided issues of scope and identified limits impacting constitutional provisions, e.g., when punishment is "cruel and unusual,"¹⁶⁷ when bail is "[e]xcessive,"¹⁶⁸ when searches and seizures are "unreasonable,"¹⁶⁹ and when congressional action is "necessary and proper."¹⁷⁰ Indeed, the Supreme Court instructed the courts to develop standards for making such determinations.¹⁷¹ Consequently, although drawing the line between international agreements that require Senate ratification and those that do not may admittedly be difficult,¹⁷² the courts cannot shy away,

166. *Id.* Apparently, the court recognized the flaw in this analogy; therefore, it attempted to draw an analogy between the silence with respect to the abrogation of treaties and the silence with regard to the adoption of approving international commercial agreements — i.e., those agreements not rising to the level of a "Treaty" within the meaning of the Treaty Clause. *See id.* However, this observation is hardly helpful, for it would still require courts to distinguish between a treaty and a non-treaty. The former would require approval by vote of two-thirds of the Senate, pursuant to the Treaty Clause, while the latter sufficing a simple legislative majority. Moreover, by virtue of the Constitution's use of different terms in, e.g., the Compact Clause and the Treaty Clause, and providing for different treatments for each type of agreement, the distinction must be judicially discoverable — as it is a legal matter because it involves textual interpretation.

167. U.S. CONST. amend. VIII.

168. *Id.*

169. *Id.* at amend. IV.

170. *Id.* art. I, § 8, cl. 18. *See also* United States v. Munoz-Flores, 495 U.S. 385, 395-96 (1990); Morrison v. Olson, 487 U.S. 654, 671 (1988) (decided line between "inferior" and "principal officer" for Article II, section 2, clause 2 purposes); Reynolds v. Sims, 377 U.S. 533 (1964) (formulating the "one person, one vote" standard, and as a consequence the Court found gerrymandering to be a justiciable issue in *Davis v. Bandemer*, 478 U.S. 109 (1986)).

171. *See* *Munoz-Flores*, 495 U.S. at 395-96.

172. *See* *Made in the USA II*, 242 F.3d 1300, 1316 (11th Cir. 2001).

under the guise of nonjusticiability, from performing its duty of judicial review, even if it entails developing new standards.¹⁷³

The circuit court rebuffed this well-established line of Supreme Court jurisprudence by simply noting that in all cases in which the Court interpreted textual provisions, defined ambiguous terms, established standards and demarcated constitutional limits, the issues did not involve foreign affairs.¹⁷⁴ Accordingly, the court reasoned, in the foreign affairs sphere, the judiciary is somehow less capable of making the same kind of decisions it is capable of making, and indeed has the duty to make, in numerous other areas. The court, however, offers no persuasive support for this novel and tenuous exception to the judiciary's role in interpreting texts and enunciating legal standards. Instead, it refers to the other two *Goldwater* factors, claiming that the "textual commitment of such matters to the political branches," as well as "prudential considerations" in the area of political and foreign relations counsels strongly in favor of judicial noninterference.¹⁷⁵

Perhaps even more misguided is the circuit court's statement that a judicial determination of an international agreement's significance, which is the essential determinant in deciding whether such an agreement's adoption requires compliance with the Treaty Clause's procedure,¹⁷⁶ would amount to the court getting involved in policy making.¹⁷⁷ The court, however, fails to explain why adjudicating the degree, or defining the limit, of a constitutional term amounts to making policy rather than announcing the law. In fact, the Supreme Court itself has declined to follow such path. Thus, while noting the difficulty of determining the Framers' intent with respect to their use of the term "treaty"¹⁷⁸ versus the term "compact,"¹⁷⁹ the Court nev-

173. See *Munoz-Flores*, 495 U.S. at 395-96; *Morrison*, 487 U.S. at 671; *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 942 (1983); *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969).

174. See *Made in the USA II*, 242 F.3d at 1317.

175. *Id.*

176. See discussion *supra* notes 164, 166.

177. See *Made in the USA II*, 242 F.3d at 1317.

178. See U.S. CONST. art. II, § 2, cl. 2 (the "Treaty Clause"); *id.* art. I, § 10, cl. 3 (the "Compacts Clause"); *id.* art. III, § 2 (the "Cases-and-Controversies Clause"); *id.* art. VI, cl. 2. (the "Supremacy Clause").

179. *Id.* art. I, § 10, cl. 3 (the "Compacts Clause").

ertheless proceeded to develop a workable approach to resolve issues implicating such questions.¹⁸⁰

C. Prudential Considerations

The circuit court also held that due to prudential considerations, the case at bar is nonjusticiable.¹⁸¹ Primarily, the court emphasized two such factors. First, a judicial declaration invalidating NAFTA on constitutional grounds at this point would lead to embarrassment of the government from multifarious pronouncements by various departments on one question.¹⁸² Such divergent positions by coordinate branches of the government would have a profoundly negative effect on the nation's economy and foreign relations, as myriad parties have relied on the beneficial changes enshrined in the NAFTA regime.¹⁸³ Second, a judicial review of the process by which the President and Congress enter into international agreements would lead to an intrusion upon the respect due coordinate branches of government.¹⁸⁴ Such an intrusion, according to the court's reasoning, is warranted only when the political branches have reached an impasse.¹⁸⁵ Thus, in the present case, since the Senate has not asserted its sole prerogative to ratify

180. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 461-63 (1978); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 563-73 (1840); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-43 (1872) (delineating the scope of the Treaty Clause); *Weinberger v. Rossi*, 456 U.S. 25 (1982); *B. Altman & Co. v. United States*, 224 U.S. 583 (1912) (construing the term "treaty" in a statute).

181. *Made in the USA II*, 242 F.3d at 1319.

182. See *id.*

183. *Id.* at 1318. The circuit court added ominously that a negative decision on NAFTA's constitutionality "would potentially undermine every other major international commercial agreement made over the past half-century." *Id.* Importantly, however, NAFTA stands out from all those other agreements in that only the former was enacted by less than a two-thirds majority of the Senate. See *Made in the USA I*, 56 F. Supp. 2d 1226, 1265 (N.D. Ala. 1999). Thus, while a mere supermajority vote may not equal passage pursuant to the Treaty Clause, the underlying protections of the Clause — i.e., affording the dissenting minorities a voice — have been effectuated thereby, effectively precluding a challenge based such constitutional protections. See *supra* note 121 (discussing the minority's protected interest under the Treaty Clause).

184. *Made in the USA II*, 242 F.3d at 1318.

185. *Id.* (citing *Goldwater v. Carter*, 444 U.S. 996 (1979) (Powell, J., concurring)).

NAFTA by a two-thirds majority, the court must demonstrate greater deference to the decisions of coordinate branches of government and exercise judicial restraint accordingly.¹⁸⁶

The court's analysis, however, is considerably wanting with respect to both concerns. Although extraordinary circumstance may arise under which there is "an unusual need for unquestioning adherence to a political decision already made,"¹⁸⁷ this case hardly presents such a scenario. Unlike the cases where the Supreme Court found the need for federal uniformity critical for the national interest, this case does not involve a crisis comparable to a war declaration¹⁸⁸ or other national emergency.¹⁸⁹ Apparently recognizing this, the circuit court conceded that the case here may not rise to such an urgent situation, yet it suggested that, while perhaps not individually, in the aggregate, i.e., a judicial decision negatively impacting the multitude of positions taken in reliance on NAFTA, may indeed give rise to an emergency-like situation.¹⁹⁰ However, the court does not elaborate on this seemingly novel, policy-like determination.

Moreover, respect due the coordinate branches of government cannot protect such branches from judicial review when their acts are challenged on grounds that they failed to adhere to specific constitutional limits on their authority.¹⁹¹ The judici-

186. See *Made in the USA II*, 242 F.3d at 1319.

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

188. *Id.* at 213 (explaining the Court's refusal to review the political departments' determination of when or whether a war has ended as grounded on the need for "finality in the political determination, for emergency's nature demands a 'prompt and unhesitating obedience'" (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827) (calling up of militia)).

189. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding the President's executive orders based upon Congress' implicit ratification of such authority because the case arose from the seizure of the American Embassy in Tehran in 1979). In a result-oriented opinion, the Court apparently struggled to legitimize the President's actions. Given the national crisis involved in *Dames & Moore*, the Court's desire to legitimize the President's challenged action is quite understandable. Still, even in view of the urgent nature of the circumstances, the Court did not purport to defer to the President under the guise of nonjusticiability.

190. *Made in the USA II*, 242 F.3d at 1318.

191. See *Powell v. McCormack*, 395 U.S. 486, 548 (1969) ("Our system of government requires . . . courts on occasion [to] interpret the Constitution in a manner at variance . . . [with] another branch.").

ary's duty to review the political branches' alleged transgressions of its constitutional power is most important in cases, such as the present one, where the constitutional provision is intended to afford protection to a minority's interest.¹⁹² Therefore, the Senate majority's acquiescence in the President's act, by virtue of their vote, should not justify or induce greater deference to the political branches' choice. *Au contraire*. A simple majority's consent to a Treaty's adoption is presumably precisely the reason the Framers provided the exceptional supermajority requirement of the Treaty Clause in the first place.¹⁹³ Consequently, it would be anomalous to hinge a decision of judicial review of the Clause's terms upon the very wrong it was intended to prevent — i.e., the simple majority's authority to adopt treaties.

Finally, exercising judicial restraint in the present case under the guise of the political question doctrine would result in rendering the two-thirds requirement of the Treaty Clause a dead letter. For simply by purporting to enact an "agreement" as opposed to a "treaty," the President in conjunction with a congressional majority can circumvent the strictures of the Treaty Clause, and consequently deprive the minority from an important constitutional protection. Thus, in the absence of judicial review of the constitutionality of such act, the Treaty Clause would in effect become a nullity.¹⁹⁴ Moreover, as the Supreme Court has intimated, the political question doctrine cannot "effectively nullify" constitutional limitations by granting the political branches unfettered authority.¹⁹⁵

192. Axiomatically, the reason for a supermajority requirement is to afford dissenting minorities added protections. See *Made in the USA I*, 56 F. Supp. 2d 1226, 1300-32, (N.D. Ala. 1999); see also discussion *supra* note 121.

193. See *Made in the USA I*, 56 F. Supp. 2d at 1300-32.

194. In *Nixon v. United States*, 506 U.S. 224, 237 (1993), the Court expressly recognized that a nonjusticiability decision cannot allow the political branches to "defeat" any "separate provision of the Constitution." See also discussion *supra* note 102.

195. See *Powell*, 395 U.S. at 533-37. Accordingly, it is unsurprising that in the nearly forty years since the Court's seminal formulation of the political question doctrine in *Baker*, the Supreme Court has never found an issue non-justiciable where the claim was based on a "specific constitutional provision that was fairly subject to a construction under which the challenged governmental action would be seen to be unconstitutional — the situation presented here." Petitioners' Petition for a Writ of Certiorari at 10, *Made in the USA II*

The circuit court's terse retort to this argument proves quite inadequate. Once more, the court resorts to its suggestion that Congress' enumerated power to "regulate commerce with foreign nations" somehow immunizes the present challenge from judicial review.¹⁹⁶ However, the court fails to offer an elaborate rationalization of its holding. Nor does it address the inevitable result of a finding of nonjusticiability in this case, namely the Treaty Clause's effective nullification.

IV. FOREIGN AFFAIRS UNIQUENESS

The dichotomy between foreign and domestic affairs is deeply embedded in the roots of American constitutional jurisprudence.¹⁹⁷ The principle of judicial abdication with respect to the President's power in foreign affairs was well established as early as *Marbury v. Madison*.¹⁹⁸ Over time, courts have refined and explained this important exception to the judiciary's role of adjudicating constitutional controversies.¹⁹⁹ Similarly, constitutional and foreign affairs scholars have debated the legitimacy of, and justifications for, such an exception.²⁰⁰ More re-

(No. 01-05) (on file with author). The opposite, however, is true — i.e., the Court relied on a constitutional term to bolster its holding of nonjusticiability where the challenge was *not* based upon a constitutional provision. See *Nixon*, 506 U.S. at 236-39 (reasoning that the term "try," of Article I, section 3, clause 6, implies a grant of broad, unreviewable power). See also *supra* note 102 and accompanying text.

196. *Made in the USA II*, 242 F.3d 1300, 1319 (11th Cir. 2001). See also Theresa Wilson, Note, *Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*, 47 *DRAKE L. REV.* 141, 176 (1998).

197. See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996).

198. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (stating that the President's foreign affairs power "can never be examinable by the courts").

199. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-20 (1936) (asserting that the differences between domestic and foreign affairs is fundamental and tracing the foreign affairs exception to judicial review to a line of British cases); *United States v. Belmont*, 304 U.S. 324, 328 (1937) (holding that the political departments' conduct in the area of foreign relations was not subject to judicial inquiry or decision).

200. See Slaughter Burley, *supra* note 17, at 1981 ("Among scholars of foreign affairs law . . . the debate over the political question doctrine is actually a conflict about whether judicial review should apply to foreign affairs.").

cently, the debate has engaged the changing landscape of international relations brought about by globalization.²⁰¹ Hence, the circuit court observed that due to “an increasingly interdependent global economy,” various international arrangements might affect national sovereignty in heretofore-unexpected ways.²⁰² Others have criticized the very notion of limiting judicial review of constitutional law at the water’s edge.²⁰³

Professor Thomas Franck presents a persuasive and forceful argument²⁰⁴ against differentiating foreign affairs cases from their domestic equivalents.²⁰⁵ In a democratic system such as ours, he argues, laws that are not subject to judicial enforcement are not laws at all, and the practice of judicial deference ignores this evident truth.²⁰⁶ Moreover, he cynically explains the origin of the judiciary’s restraint in the foreign relations sphere as a calculated strategy — a “Faustian pact” — under which the judiciary throws a relatively inexpensive “giveback” to the political branches in exchange for the former’s exercise of supremacy in the domestic arena.²⁰⁷ In his chronicle of the de-

201. See generally Curtis A. Bradley, *Symposium Overview: A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999); Note, *Restructuring the Modern Treaty Power*, 114 HARV. L. REV. 2478 (2001).

202. *Made in the USA II*, 242 F.3d 1300, 1315 n.33 (11th Cir. 2001). Although the circuit court made this observation in order to prove the lack of judicially manageable standards, it may actually prove the opposite. Indeed, because of the pervasiveness of globalization, courts cannot afford to exclude foreign affairs from its domain — as purely domestic matters are dwindling. See Slaughter Burley, *supra* note 17, at 1980 (“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,” (quoting *The Inauguration: “We Force the Spring;” Transcript of Address by President Clinton*, N.Y. TIMES, Jan. 21, 1993, at A15)).

203. See FRANCK, *supra* note 19, at 159.

204. See Carl Landauer, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, 87 AM. J. INT’L L. 465, 466 (1993) (book review) (Franck’s book is a moral, and “at times emotional argument against the use of the political question doctrine by U.S. courts to abstain from deciding cases that touch upon foreign policy.”); Slaughter Burley, *supra* note 17, at 1981 (calling Franck’s argument “elegant, erudite, and often passionate”).

205. See FRANCK, *supra* note 19, at 8 (“A foreign policy exempt from judicial review is tantamount to governance by men and women emancipated from the bounds of law.”).

206. *Id.*

207. *Id.* at 12.

velopment of the doctrine, Franck describes how the federal judiciary has taken this trade-off as a matter of "orthodoxy."²⁰⁸

In spite of this deeply embedded tradition, Franck nonetheless detects the judiciary's ambivalence, which results in a "powerful whiff of hypocrisy."²⁰⁹ Although repeatedly invoking the doctrine, many courts seem not to have taken its teaching seriously to heart, for although dutifully referring to the doctrine, they will reach a decision on the merits, regardless.²¹⁰ Essentially, Franck sees a judiciary that is result-oriented, intent on conforming to the foreign policy decisions of the executive, whether by adjudicating on the merits or by claiming non-judiciability in a given case.²¹¹ This tendency is most vividly illustrated in the twin decisions of the district court and the circuit court in *Made in the USA Foundation*. Both courts reached the same ultimate result: validation of the means utilized by the political branches for adopting NAFTA. In the process of reaching this result, the courts exhibited great deference to the foreign policy decision of the President and the Congress. The only difference was each respective court's approach. Whereas the district court decided on the merits, the circuit court chose to decide on the "threshold" matter, and indeed accomplished that, no less, by employing reasoning parallel to the district court's reasoning on the merits.²¹² However, the latter's choice may be unjustified as a matter of principle with respect to the judiciary's role in our system.²¹³

V. CONCLUSION

As demonstrated above, courts can effectively mold the political question doctrine to suit their desired result. Viewed thus, the doctrine is a mere pretense for the judiciary's politi-

208. *Id.* at 30.

209. *Id.*

210. *Id.*

211. Landauer, *supra* note 204, at 456.

212. See *supra* notes 11-16 and accompanying text. See also Lederman, *supra* note 132, at 36 (arguing that although reaching the same ultimate "stabilizing result," the circuit court's approach is preferable to that of the district court's because the former, by not even "calling into question" the validity of international agreements, "more clearly promotes international stability").

213. See generally FRANCK, *supra* note 19; Redish, *supra* note 134.

cally motivated abdicationisms. Nevertheless, the doctrine does have rather significant justifiable purposes. Hence, even as staunch a critic as Professor Franck concedes the doctrine's legitimacy under certain exigent circumstances, such as "in the midst of military hostilities."²¹⁴ However, in *Made in USA Foundation*, since it concerns a commercial agreement, such justification for applying the doctrine seems to be lacking.

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214. FRANCK, *supra* note 19, at 58.

* The author is expected to receive his J.D. Degree from Brooklyn Law School in June 2003. He would like to thank his wife, Sarah, for her unwavering support and love, through triumphs and tribulations. He dedicates this Comment to her and to their precious children, Chaim, Joel, Shulem and Gitty for making it all worthwhile.