

# SHOULD EXTRATERRITORIALITY IN THE MIDST OF CONGRESSIONAL SILENCE BE A POLITICAL QUESTION?

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*From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. To classify the various instances as "political questions" is rather a form of stating this conclusion than revealing of analysis.<sup>1</sup>*

## I. INTRODUCTION

The U.S. system of government charges the federal judiciary with the authority to decide cases and controversies,<sup>2</sup> whereas matters such as foreign policy, impeachment, and constitutional amendment lie within the competence of the political branches.<sup>3</sup> Defining the scope and extent of political questions can be difficult. With unprecedented issues involv-

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1. Baker v. Carr, 369 U.S. 186, 280–281 (1962).

2. U.S. CONST. art. III, § 2, cl 1.

3. See, e.g., Luther v. Borden, 48 U.S. 1 (1849) (the guarantee of a republican form of government is a political question); Coleman v. Miller, 307 U.S. 433 (1939) (amending the federal Constitution is a political question); Goldwater v. Carter, 444 U.S. 996 (1979) (the authority of the president to

ing territorial boundaries or foreign policy, courts must decide how they will differentiate between justiciable issues and political questions.<sup>4</sup> Consider U.S. adjudication of cases with partly foreign conduct or foreign nationals brought under a U.S. federal statute. The relief sought typically includes the enforcement of that domestic statute against some foreign element, be it a state, foreign citizen, or some other foreign juridical person. This application of U.S. statutes against foreign entities and behavior is extraterritoriality.<sup>5</sup>

The problem with extraterritoriality is that while some cases present apparently justiciable adversarial controversies, they also contain various foreign elements. In dealing with these elements, U.S. adjudication tends to (1) infringe on foreign states, (2) present weak nexuses to the United States, and, ultimately, (3) violate the separation of powers. This Comment focuses on the issue of extraterritoriality in cases where the statute at issue is silent as to its geographic reach.<sup>6</sup> A useful example of this dilemma is found in the Exchange Act's Section 10(b) and Rule 10b-5—legislation regarding and regulating securities transactions, respectively. Both are silent as to extraterritorial application.<sup>7</sup> This Comment argues that such situations should be categorized as political questions in order to force the political branches to address the foreign implications of legislation and avoid possible foreign resentment from the overreach of U.S. statutes upon foreign entities.

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terminate treaties is a political question); *Nixon v. United States*, 506 U.S. 224 (1993) (the authority to try impeachments is a political question).

4. As the first case to allude to the political question doctrine, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) declares that “[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”

5. See CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 169 (2d ed. 2015) (defining extraterritoriality as “the application of federal and state law to conduct that takes place at least partially outside the territory of the United States.”).

6. This Comment’s conclusion is limited to situations where there is no indication of extraterritorial application in the statute. If congressional intent either in favor or against extraterritoriality is present in the statute, then there is no problem and the courts are free to analyze the facts of the case under the clear provisions of the statute duly enacted by Congress.

7. See 15 U.S.C. § 78j; see also General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.

## II. *BAKER v. CARR* CATEGORIES

### A. *Background on Baker v. Carr*

*Baker v. Carr* is an important case outlining the political question doctrine. Writing for the majority, Justice Brennan provides a list of factors to be considered when deciding whether an issue involves a political question.<sup>8</sup> The presence of a political question does not require dismissal of the case. As the Court makes clear, “[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence. The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’”<sup>9</sup> In simpler terms, the political question concerns the “relationship between the judiciary and the coordinate branches of the Federal Government”<sup>10</sup> and is “primarily a function of the separation of powers.”<sup>11</sup> In deciding justiciability under this doctrine, courts analyze the propriety of “attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination.”<sup>12</sup>

### B. *Analysis of Baker v. Carr’s Factors for Determining Political Questions*

The *Baker v. Carr* opinion provides a non-exhaustive list of six factors which contribute to the judiciary’s adjudicative incompetence. An examination of extraterritoriality under three of the six outlined factors underscores the necessity of classifying issues of extraterritoriality as political questions when the statute at issue is silent as to its geographic reach. This analysis is particularly relevant in the context of the following three

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8. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). The six outlined examples include whether the controversy is categorized as one of the following: (1) textually committed to another branch; (2) no judicially manageable standards; (3) deciding case would force the judge to make a policy choice that would be better if decided by the political branches; (4) judicial decision in this case would create a lack of respect for the coordinate branches; (5) an extraordinary need for adherence to a political decision already made; or (6) potential embarrassment to have multiple ruling from different branches of government.

9. *Id.*

10. *Id.* at 210.

11. *Id.*

12. *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939).

factors: (2) no judicially manageable standards; (3) deciding the case would force the judge to make a policy choice that would be better if decided by the political branches; or (6) potential embarrassment to have multiple ruling from different branches of government.<sup>13</sup>

The President is the decisionmaker when it comes to foreign affairs. It is the responsibility of the President to speak on behalf of the United States with one voice and to eschew foreign conflict. With regard to extraterritoriality in legal cases, such conflict is manifested via judicial holdings that extend U.S. law to unconsenting foreign entities.<sup>14</sup> Were extraterritorial applications with congressional silence considered political questions, the judiciary would never be presented with the opportunity to resolve the cases of other states for other states' nationals. This commentary examines situations involving extraterritorial application under factors (2), (3), and (6) of *Baker v. Carr* to demonstrate how these situations should be more appropriately categorized as political questions.

1. *Factor #2: A lack of judicially discoverable and manageable standards for resolving it . . .*<sup>15</sup>

This factor implies that because the relevant statute does not provide the judiciary with a solid method or strategy for resolving cases of a transnational nature, courts are ill-equipped to handle these cases. Nevertheless, courts have responded in the following ways: developing their own tests for determining whether extraterritorial application of U.S. law is appropriate, analyzing what Congress would have intended had they thought about the issue, and reinvigorating the long-standing presumption against extraterritoriality,<sup>16</sup> which stems

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13. Baker, 369 U.S. at 217.

14. See Austen L. Parrish, *Fading Extraterritoriality and Isolationism? Developments in the United States*, 24 IND. J. GLOBAL LEGAL STUD. 207, 220 (2017) (noting that abandoning "multilateral lawmaking leads to fragmentation of the international system and to the perception of American exceptionalism.").

15. Baker, 369 U.S. at 217.

16. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 203, pt. II, ch. 1 (AM. LAW INST., Tentative Draft No. 2, 2016) ("U.S. courts interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary."); see also Austen L. Parrish, *Evading Legislative*

from the assumption that “Congress is primarily concerned with domestic conditions.”<sup>17</sup>

While one may admire the judiciary’s active role in striving to resolve these foreign cases—many of first impression—under ambiguous or silent statutes with little to no legislative history on the issue of extraterritoriality, such practice has produced a multitude of arbitrary and inconsistent holdings. This is simply because these cases have been lodged with the improper branch of government. For example, court decisions in the antitrust and securities context are replete with the formulation of new tests by overruling prior ones, judicial guessing games regarding congressional intent, and inconsistent holdings.<sup>18</sup>

The longstanding notion that all legislation is *prima facie* territorial began steadily fading as globalization inevitably met with technology. With the passage of time and such developments, cases are increasingly riddled with foreign elements. As a consequence, the judiciary is now witness to foreign nationals suing U.S. nationals or U.S. nationals suing foreign issuers over either partly or wholly foreign conduct. Sometimes there are negative effects in the United States which lessen the impropriety of addressing extraterritoriality in the judicial branch, but sometimes there are not. In response, courts have effectively legislated from the bench to expand the geographic enforcement of certain federal laws, such as the Exchange Act, to reach the foreign parties or conduct.

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*Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1703 (2012) (“Underlying the presumption is the understanding that Congress, rather than the courts, is better equipped to make the policy and judgment calls as to whether law should apply to foreign conduct.”).

17. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

18. See generally *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975). As an example, in trying to discern congressional intent, courts in pre-*Morrison* cases took either a restrictive approach, as they did in *Zoelsch* in the D.C. Circuit; a broad approach, such as in *Hotz* in the Ninth Circuit; or have adopted a balanced approach, as articulated by *Vencap* from the Second Circuit. Thus, whether a case extended extraterritorially depended not so much on the facts of the case as the court in which case is brought. This demonstrates the confusion, multi-layer process, and inconsistencies that occur when courts get involved with the issue of extraterritorial extensions in cases where the statute is silent as to their geographic reach.

The effects test was articulated first in *Schoenbaum*—which required that foreign conduct cause an injury to either U.S. investors or markets in order for the Exchange Act to extend abroad to regulate foreign conduct or nationals in pre-*Morrison*-cases.<sup>19</sup> Once this was demonstrated, extraterritorial application of U.S. law was deemed both necessary and appropriate. The conduct test was then pronounced in *Leasco*, mandating that there be some conduct in or link to the United States in the perpetration of the misrepresentation or fraud before extending the Exchange Act abroad in pre-*Morrison* cases.<sup>20</sup> This soon became an additional basis upon which to extend the Exchange Act's antifraud provisions to foreign entities and foreign conduct. However, the judiciary did not stop there. It soon developed qualitative policy reasons for justifying extraterritoriality.<sup>21</sup> It appeared at this stage—in the late 1970s—that extraterritorial application could be justified even with little domestic conduct or effect.

Before the new millennium, the Supreme Court set forth a restrained and moderated approach regarding when, why, and to what extent statutes would be applied abroad when Congress is silent on the matter. It reinvigorated the presumption against extraterritoriality. The Court declared in *EEOC v. Arabian American Oil Company (Aramco)* that Congress is primarily concerned with domestic decisions and asserted that a clear statement of congressional intent regarding the propriety of extraterritorial application in the statute was necessary to rebut the presumption.<sup>22</sup>

This stance, though strict, did not fix the problems of inconsistency and arbitrariness in court decisions concerning extraterritoriality. In *Hartford Fire*, the Court extended the Sher-

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19. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968), *abrogated in part by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

20. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972), *abrogated by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

21. *See SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977), *abrogated by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (“From a policy perspective, and it should be recognized that this case in a large measure calls for a policy decision, we believe that there are sound rationales for asserting jurisdiction.”).

22. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc.*, 336 U.S. at 285).

man Act, which makes “every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal,” to foreign conduct on the basis that the Act will apply where there are effects in the United States and is thus not subject to the presumption.<sup>23</sup> However, about a decade later in *F. Hoffmann-La Roche*, the Court reversed its position and held that the Sherman Act is subject to the presumption and that foreign harm is insufficient to rebut it.<sup>24</sup>

The Court decided *Morrison v. National Australia Bank* in 2010.<sup>25</sup> The facts involved foreign plaintiffs suing a foreign defendant in connection with foreign conduct—a so-called foreign-cubed transaction. Though a complicated case, the critical holdings concerned (1) the characterization of extraterritoriality as a merits question as opposed to one of subject matter jurisdiction, and (2) the abandonment of the conduct and effects tests and articulation of the “transactional test” in its place for transnational securities claims.<sup>26</sup> To enforce the holding, the Court set forth a strategy for interpreting statutes when deciding whether the judiciary should extend the reach of U.S. securities laws abroad. First, look to the plain language of the statute. “[W]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>27</sup> Next, if there is no indication of extraterritoriality, determine the “focus” of the statute.<sup>28</sup> The *Morrison* Court determined the focus of the Exchange Act to be “only transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”<sup>29</sup> This was coined the *transactional test*. The Court swiftly moved to the second step because there was no explicit indication that Congress intended the Exchange Act to apply extraterritorially. Since the plaintiffs in *Morrison* did not fall within

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23. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”).

24. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004) (concluding that the Sherman Act “does not apply where the plaintiff’s claim rests solely on the independent foreign harm”).

25. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

26. *Id.* at 254, 269–70.

27. *Id.* at 255.

28. *Id.* at 266.

29. *Id.* at 267.

either of the two prongs of the transactional test, the claim was dismissed.<sup>30</sup>

While the *Morrison* majority was correct to adhere to the longstanding presumption against extraterritoriality, its creation of the domestic focus inquiry was severely flawed because it did not eliminate the arbitrariness associated with the prior conduct and effects tests.<sup>31</sup> About one month after *Morrison* was decided, Congress passed Dodd-Frank.<sup>32</sup> Significantly, Congress hastily inserted a provision—Section 929P(b), dealing with extraterritoriality—in an arguable attempt to overrule *Morrison*. Section 929P(b) of Dodd-Frank attempts to resurrect the conduct and effects tests but only in actions brought by the SEC or DOJ; it does not mention the private right of action.<sup>33</sup>

The new subsection regarding extraterritorial application was drafted in jurisdictional language after *Morrison* held that extraterritoriality was a merits question.<sup>34</sup> This gave rise to a heated debate over whether this provision had any effect at all.<sup>35</sup> The *Morrison*-Dodd-Frank dilemma also produced a situa-

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30. *Id.* at 273.

31. The first step, as articulated by *Morrison*, is to see if there is a clear indication of congressional intent in the statute. If not, the analysis proceeds to the second step. This step asks whether the case involves domestic concern and to decide this, courts ordinarily look at the *focus* of statute. For instance, is focus of the statute designed to protect the United States? Or simply, does it have a domestic focus and what is it? In analyzing this step, how do courts determine focus? It is not found in the clear, express congressional intent. There is none in the legal context addressed by this Comment—congressional intent was silent; that is why the analysis starts with the second step. Thus, to identify the focus, courts look at whether some of the relevant conduct occurred in the United States. If it did, then extraterritorial application is usually permissible. If the focus involves conduct relevant to a foreign state, then extraterritorial application is impermissible. Unfortunately, this ‘conduct-examining-focus-test’ is the substantial equivalent of the pre-*Morrison* conduct and effects tests.

32. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1865 (2010).

33. *Id.*

34. *Morrison*, 561 U.S. at 254 (“But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.”).

35. For an argument in favor of Section 929P(b) validity, see Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. Australia National Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 20–21 (2011) (concluding that there is no alternative reading other than to codify the conduct and effects tests in actions brought

tion where one branch of government—the judiciary—began to utterly disregard the intent of another branch—the legislature.<sup>36</sup> Thus, although compelling arguments can be made that the statute has no effect due to its jurisdictional language, caselaw to this day is still inconsistent and varies from circuit to circuit on the appropriate standard.

2. *Factor #3*: The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . .<sup>37</sup>

This factor accounts for instances where a case concerns a policy issue so inherent to either the executive or legislature that judicial involvement and resolution would be a violation of the separation of powers. When courts begin deciding, for example, where borders begin and end, they are making policy decisions. Under this factor, whether foreign-cubed transactions can be brought in U.S. courts is a contested issue. Inclusion of such cases could expand U.S. jurisdiction too far by creating a cause of action for foreign nationals that would normally be thought well outside of U.S. jurisdiction. This issue could be resolved if Congress expressly provided the right to a cause of action for foreign nationals, but also might give rise to debate regarding the sufficiency of the nexus to the United States. Such an analysis is beyond the scope of this Comment, but it is worth noting that these decisions in the past have tended to negatively affect other states' sovereignty.<sup>38</sup> Simply

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by the SEC or DOJ). For an argument against Section 929P(b) validity, see Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 229 (2011) (arguing that Section 929P(b) only provides jurisdiction that the courts already had and does not alleviate the pre-*Morrison* confusion).

36. See *SEC v. Tourre*, 2013 WL 2407172, at \*2 n. 4. (S.D.N.Y. June 4, 2013) (recognizing that “Dodd-Frank Act effectively reversed *Morrison* in the context of SEC enforcement actions.”); see also *SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1293–1294 (D. Utah 2017) (“[T]he text of Section 929P(b) . . . point[s] to a congressional intent that, in actions brought by the SEC, Sections 10(b) and 17(a) should be applied to extraterritorial transactions to the extent that the conduct and effects test can be satisfied.”). But see *SEC v. Ahmed*, 308 F. Supp. 3d 628, 664 n.32 (D. Conn. 2018) (declining to consider the *Morrison*-Dodd-Frank debate since “the SEC has met the more stringent *Morrison* test.”).

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

38. See Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws*:

put, U.S. courts should not be deciding the territorial lines of a state's sovereignty.

Additionally, if courts are able to decide the extent of a statute's geographic reach and enforce it against a foreign national or find a cause of action based on foreign conduct, the courts are, in effect, *making law*. Following this logic, the judiciary could broadly expand or contract the scope of a statute and formulate new law under the guise of interpreting congressional intent. This is a violation of the fundamental principles underlying the separation of powers, which expressly grant law-making authority to the legislative branch.<sup>39</sup>

3. *Factor #6: The potentiality of embarrassment from multifarious pronouncements by various departments on one question . . . .*<sup>40</sup>

This factor addresses the potential problems created by political questions based on the concern that different branches of government might promulgate differing plans to address the same policy issue. As an oversimplified example, if the courts hold that a certain class of plaintiffs is not entitled to have a statute's provisions enforced in their favor and then Congress subsequently enacts or amends legislation to the contrary, a situation arises where separate branches make two differing pronouncements on the same question.

As mentioned, this problem arises because the judiciary has taken it upon themselves to construe a statute as either providing for or prohibiting extraterritorial application where there is no indication as to either from Congress. The question in these circumstances always becomes *whether or not the court interpreted the statute correctly*. In other words, the court's interpretation of the statute may be incorrect. Courts have re-

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*The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 119 (2003) (noting that "courts are not well suited to analyze these delicate issues and balance the interests of a foreign sovereign against the interests of the United States" and that "courts are poorly equipped to handle concerns about U.S. policy raised by extraterritoriality.").

39. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

40. *Baker*, 369 U.S. at 217.

peatedly tried to discern congressional intent<sup>41</sup> or formulate multi-step tests<sup>42</sup> to determine such intent, but they have no means of truly knowing exactly what Congress meant without explicit language. In fact, and not surprisingly, the judiciary's interpretation of congressional intent has sometimes been proved incorrect.

Consider the extraterritorial applications of U.S. anti-discrimination laws, particularly Title VII of the Civil Rights Act of 1964 (Title VII),<sup>43</sup> the Americans with Disabilities Act (ADA),<sup>44</sup> and the Age Discrimination and Employment Act (ADEA).<sup>45</sup> All three of these statutes were expressly amended by Congress to apply to foreign conduct after the judiciary interpreted them as having no extraterritorial application.<sup>46</sup> It appears that Congress reacted swiftly in order to rebuke the judiciary's interpretation of these statutes—an interpretation of congressional intent that was not in fact what Congress intended.<sup>47</sup>

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41. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975) (asking whether “Congress would have wished” the judiciary to decide this case), *abrogated by* *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

42. See *Morrison*, 561 U.S. at 255, 266 (setting forth the new standard that the court should first determine whether there is a clear indication for extraterritorial application in the statute. If there is not, then courts are to determine the “focus” of the statute at issue. If such focus is determined to concern domestic conduct, then the statute will not be applied extraterritorially unless there is domestic conduct alleged).

43. 42 U.S.C. § 21; see *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). In *Aramco*, the Supreme Court held that Title VII, which did not include language of extraterritorial application, did not apply extraterritorially. Later that year, Congress amended Title VII to apply extraterritorially.

44. 42 U.S.C. § 126. After *Aramco* was effectively overturned by Congress's amendment of Title VII providing for extraterritorial application, Congress also amended the ADA to allow for extraterritorial application.

45. 29 U.S.C. § 623; see *Cleary v. U.S. Lines, Inc.*, 555 F. Supp. 1251, 1263 (D.N.J. 1983). In *Cleary*, the Third Circuit held that the ADEA did not apply extraterritorially due to the congressional silence on the matter. About one year later, Congress amended the ADEA to extend extraterritorially.

46. See 42 U.S.C. §2000e-1; 42 U.S.C. § 12112(c)(1); *Arabian Am. Oil Co.*, 499 U.S. at 244 (Congress amended Title VII and the ADA after the *Aramco* decision to explicitly grant extraterritorial application); see also 29 U.S.C. § 623(f)(1); *Cleary*, 555 F. Supp. at 1251 (Congress amended the ADEA after the *Cleary* decision to specifically provide for extraterritorial application).

47. See Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991); *Arabian Am. Oil Co.*, 499 U.S. at 258–59 (discussing how after *Aramco* was decided on March 26, 1991, Congress quickly reacted to overturn its holding

These embarrassing situations could have been avoided entirely if each case, due to the congressional silence, had been dismissed as a political question and directed to the political branches for resolution of the issue. Then only one pronouncement would have been made—likely from Congress—about the extent of the statute’s geographic reach. For instance, had *Aramco* been dismissed as a nonjusticiable political question due to the congressional silence in Title VII as to its applicability to foreign conduct, the dismissal likely would have prompted Congressional amendment of the statute to provide for such extraterritorial application. Whether allowing U.S. statutes to freely cross borders and be enforced against foreign entities is a prudent decision is beyond the scope of the Comment, but it is safe to conclude that had Congress initially amended Title VII after *Aramco*’s dismissal as a political question, the result would have been the same with one difference: there would not be multiple pronouncements on the same issue.

### III. ANALYSIS AND OUTLOOK

Treating the matter of extraterritorial application of U.S. laws without explicit Congressional authority as a political question has many critical benefits, including the three discussed below. Most importantly, it forces the political branches to reach consensus on the geographic reach of a statute and avoids sporadic, piecemeal decisions of the judiciary.

First, Congress sits in a better position to determine extraterritorial application in cases involving foreign conduct and multiple territories because Congress is, after all, the branch responsible for enacting statutes with clear geographic boundaries.<sup>48</sup> If authority over extraterritorial application were limited to the legislative branch, there would be no need to guess Congress’ intentions and there would be no need for a domestic focus analysis. In turn, this would eliminate the unpredictability in case holdings as well as the inconsistent practice of utilizing extraterritoriality in some cases, but not in others.

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by amending Title VII of the Civil Rights Act and the ADA on November 21, 1991—less than eight months after the Supreme Court decided *Aramco*).

48. See Chang, *supra* note 38, at 120 (concluding that “the inherent difficulty of requiring courts to analyze extraterritoriality on a case-by-case basis, to consider the relevant policy implications, and to weigh the interests of the United States and a foreign sovereign requires a legislative solution.”).

Second, making extraterritoriality a political question would give clear notice to the lower courts of the precise intentions of the political branches regarding proper procedure for cases that involve foreign elements. Without clear guidelines set by Congress, the judiciary can only do so much to both provide for consistent application of U.S. law and best adhere to the intent of Congress. It is inevitable that lower courts will disagree and varying standards will be introduced. Where the statute is silent as to its geographic reach, the issue should be nonjusticiable and Congress should amend the statute to make its intent clear. By giving the appropriate notice to the lower courts proper judicial precedent is set, attorneys are apprised of which cases are suitable for judicial review, and most claimants will be treated by the same process both procedurally and substantively.

Third, foreign resentment would be reduced, and U.S. reputation would be enhanced. It is not proper for the judiciary to decide sensitive policy issues that cross multiple borders. It is undemocratic, as the foreign nationals who are subject to the reach of U.S. law did not participate in the U.S. democratic process, and this judicial law-making pattern violates the separation of powers. The modern practice of judicial interpretation in this context is impermissible unilateral action as the judiciary applies a U.S. statute against foreigners that is otherwise devoid of authority from the political branches. This current trend also harms international relations because “[u]nilaterally imposed extraterritorial measures often undermine and hamper [ ] multilateral efforts.”<sup>49</sup>

Thus, it is not always “emphatically the province and duty of the judicial department to say what the law is,”<sup>50</sup> at least to the extent that the statute asserting the law does not clearly express whether extraterritorial application is appropriate. However, *it is* the duty of the courts to decline to hear certain cases that infringe on the competence and responsibility of the political branches. This is the very essence of the political question doctrine.

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49. See Parrish, *supra* note 16, at 1703 (“[G]lobal challenges usually require comprehensive, harmonized responses, with cooperation and agreement among many states.”).

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

## IV. CONCLUSION

*Baker v. Carr* provided a basic template of the types of cases that are not generally considered to be within the competence of the judiciary. Instead, these issues are more appropriately categorized as matters to be decided and acted upon by the political branches of government. Extraterritorial applications of U.S. law when the particular statute is silent as to its geographic reach provides an example of nonjusticiable questions.

Regarding the second factor from *Baker*—*lack of judicially discoverable and manageable standards for resolving the issue*—one need look no further than the history of extraterritorial applications of the Exchange Act to see the inconsistent decision-making of the courts and awkward guessing games of discerning congressional intent. The third factor from *Baker*—*impossibility of deciding without an initial policy determination*—demonstrates that the judiciary is incompetent to adjudicate disputes that concern territorial sovereignty both of the United States and foreign states. Lastly, the sixth factor from *Baker*—*potentiality of embarrassment from multifarious pronouncements*—would be eliminated in a system where only one branch of government decides the extent of a statute's geographic reach. Thus, taking the issue of the propriety of extraterritoriality in the face of a silent statute out of the hands of the judiciary and placing it within the exclusive purview of the political branches will ensure the preservation of the separation of powers.

Assessing and determining extraterritorial application of U.S. statutes involves both foreign policy and statutory construction. It is incumbent upon the political branches to deal in matters of foreign policy and ensure that the sovereignty of other states is not infringed by inconsistent judicial decision-making. Furthermore, it is the responsibility of the political branches to make intent clear in duly enacted statutes, and this duty becomes more pressing when dealing with foreign elements. Thus, the political branches need to provide for clearer standards for the judiciary and maintain foreign relationships with other sovereigns, which invariably includes reducing the resentment they feel when U.S. law encroaches their borders and is felt by their nationals. After all, isn't this what the political branches are for?