Asymmetric World Jurisprudence

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I. INTRODUCTION

An asymmetric world—marked by gross imbalances of power and unconventional tactics—requires that we regularly reexamine federal judicial power and its limits. Now, more than ever, the jurisdiction and justiciability doctrines cannot remain static. Since 9/11, the judiciary’s coequal branches of government have flexed significant political muscle in waging the global “war on terror.” These congressional and executive actions have direct and indirect consequences on the rule of law and on constitutional rights. Such consequences place special importance on the Supreme Court’s essential function of safeguarding constitutional protections.

This Article accepts the invitation to think boldly—to get radical about our judicial vision. We began a dialogue on Alternative Judicial Visions as part of a panel held at the Southeastern Association of Law Schools conference in July 2008. My remarks center on the need for the federal judiciary to exercise a strong voice when another branch has upset the balance of powers. President George W. Bush’s broad interpretation of executive authority in the execution of the global war on terror, often supported by Congress, required that the Court act more aggressively to keep the other branches in check. One consequence of 9/11 is the new reality of ever-present asymmetric warfare. A more dynamic judicial theory is necessary, and a rethinking of restraint doctrines is imperative. This Article focuses on the application of one justiciability doctrine—the political question doctrine—because of its unique relevance in times of great separation-of-powers tension.

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"Asymmetric world" has more than one meaning. The global reality demonstrates the gross imbalances of power and the increased use of unconventional tactics. Those who exercise power include nontraditional actors, such as alleged terrorists, who operate beyond nation-state borders. On a domestic level, another asymmetry exists—the external pressures of terrorism caused a heightened response by the political branches in the United States. Thus, the federal judiciary confronts a domestic balance of powers that is asymmetrical. The judicial branch must be dynamic: it must be aware of its surroundings and adapt its doctrines. In asymmetrical times, the political branches need expanded powers, but this reality carries the threat of overreaching. The Court will need to demonstrate that it will check the political branches as part of its separation-of-powers duty. Accordingly, the Court will need to consider more carefully when to assume jurisdiction, when to exercise judicial review, and when to speak boldly.

The world’s asymmetric reality, including threats to the rule of law and constitutional protections, dictates reviewing doctrines of judicial restraint. The reexamination should cover popular approaches as well as judicially created restraints, including judicial minimalism, hostility to litigation, and the prudential justiciability doctrines. These doctrines of restraint seek to serve laudable purposes, including respecting other branches’ spheres of legitimate control and preserving scarce judicial resources. Such doctrines foster an environment in which the Supreme Court hears fewer cases and often limits the substantive reach of those cases. This Article assumes that the Court will maintain or continue to shrink its docket.

With mandatory appellate jurisdiction almost gone, the Supreme Court exercises enormous discretion when granting certiorari; the Court grants only 3-4% of petitions each year. In the current era, it is safe to assume that the Court will likely decide only seventy cases per year. In the 2007 term from October 2 to June 28, for example, the Court decided only sixty-eight cases—"the fewest since the 65 cases the court decided in 1953." These rates reflect a tenfold decrease since 1924; in the

1. Procedural reforms are not the crux of this Article but remain important. Such reforms include increasing the Supreme Court’s docket and enhancing the types of cases selected for review. Professor Amanda Frost addressed these issues at the SEALS Conference Alternative Judicial Visions Panel in Palm Beach, Florida (July 2008).
current decade, "the Supreme Court reviews only one in one hundred appellate decisions."\(^4\) Given the declining rate of discretionary review, vigilant reexamination of the purposes and means of jurisdictional limits is necessary to ensure safeguarding of constitutional protections. Particular scrutiny should flow when the tensions touch on the heart of the American constitutional democracy—the separation of powers.

The new reality suggests that the other branches of American government will exercise their authority in bold and unanticipated ways at home and abroad. Many such actions will involve interpretations of constitutional authority and may impinge on individual constitutional rights. The unforeseen method of attack on 9/11 caused inflated international and domestic responses to re-secure our national security. The terrorist attacks exposed our vulnerabilities and served as a catalyst for much-needed security repair. In hindsight, some actions will be viewed as reacting too broadly at the expense of constitutional freedoms. Tensions between the individual vis-à-vis the government will continue to be under stress.

Other tensions are also on the rise. The current economic crisis has triggered a greatly expanded federal role. The federal government is increasingly involved in managing the economy. This expanded federal involvement will add stress on the freedom to contract, federalism, pre-emption doctrine, and separation of powers. For example, iterations of the Wall Street bailout legislation included a jurisdiction-stripping provision.\(^5\) Similar legislation may unfold with respect to the auto industry and beyond. As the federal political branches become more entrenched, the parameters of the federal judiciary's role will require attention.

In addition, the militarization of, and Presidential involvement in, terrorism cases brings acute tension on the separation of powers. Accordingly, the new asymmetric reality will call for greater federal court involvement. Further, the asymmetric reality has no end in sight. The federal judiciary will need to help by checking the other branches to facilitate a political course of correction. The political branches, legislative and executive, will continue to choose and manage the course of national security, but the Court must answer the call when constitutional

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5. See, e.g., Rod Smolla, Wall Street Strip—Is Paulson’s Bailout Bill Unconstitutional, SLATE, Sept. 24, 2008, http://www.slate.com/id/2200817/ (quoting the jurisdiction-stripping provision from Section 8 of Paulson's proposal: “Decisions by the Secretary pursuant to the authority of this Act are non-reviewable and committed to agency discretion, and may not be reviewed by any court of law or any administrative agency.”); Text of Draft Proposal for Bailout Plan, N.Y. TIMES, Sept. 20, 2008 (providing the full text of Paulson’s bailout proposal).
bounds are violated. This heightened context will no doubt require the Court to enter the fray to protect constitutional rights as they are tested in new and unforeseen ways. The federal judiciary must be careful not to overstep its power. Yet, the consequences of a failure to act, a decision lacking clarity, or minimalist, piecemeal responses may be dire.

To what extent, if any, should the Court adjust to this reality? Chief Justice John Roberts's confirmation hearings included advocacy for unanimity, collegiality, and a judge-as-umpire model. Since confirmation, Chief Justice Roberts has influenced the Court's reluctance to hear certain cases and its overt restraint as a driving influence in decision making. Related consequences include a shrinking docket and a shift in the nature of cases from constitutional rights to business matters. Forces of restraint, such as judicial minimalism and avoidance doctrines, stem from a respectable concern regarding the temptation to abuse power. Such doctrines of restraint may embody wise impulses, but these doctrines should not constitute governing jurisprudence for all cases.

The Supreme Court should reconsider its prudential justiciability doctrines and their underlying assumptions. For example, consider the conventional wisdom regarding the justiciability doctrines: "[T]he justiciability doctrines conserve judicial resources, allowing the federal courts to focus their attention on the matters most deserving of review." What if the federal courts are not using justiciability doctrines to focus on matters most deserving of review but instead are using justiciability doctrines as shields to dismiss thorny matters and avoid confrontation? The Supreme Court, in particular, may be shifting its interests towards business cases rather than individual constitutional rights. To the extent the Court is tempted to use the justiciability doctrines to defer to the political branches, is such avoidance riskier in the modern asymmetric climate? The increased risk stems from the temptation of the political branches to overstep their authority and from the severe consequences of such overreaches if left unchecked. Alternatively, the Court may hear the case but rule in a minimalist fashion and, rather than address the primary merits, signal to another branch that it should act. This Article will address the potential dangers of judicial minimalism as a governing jurisprudence in these times.

As a global theory, this Article offers a judicial dynamism model. It then articulates the relevance of the political question doctrine and the need to view the doctrine as prudential rather than constitutional. Once viewed as prudential, the political question doctrine should remain

7. ERWIN CHERMERINSKY, FEDERAL JURISDICTION 45 (5th ed. 2007).
flexible; the contours of any given separation-of-powers alignment should tilt the jurisdictional scales. For example, I present an alignment hypothesis: if the President and Congress have aligned to support a federal action that implicates constitutional rights, the jurisdictional scales should tilt in favor of judicial review on the merits. This Article concludes that such a reframing will allow the Court to have a dynamic voice when it matters most.

First, I discuss the Supreme Court’s increased use of judicial minimalism and the political question doctrine to avoid important cases and reduce its docket. Second, I describe my model, in which the court takes a dynamic approach to such issues, dependent upon the political climate, to maintain its appropriate stature and the Constitution’s intended balance of powers. I use two recent cases to illustrate my prescription and how it is particularly relevant to the ongoing war on terror. Third, I examine the long-standing political question doctrine and show how dynamism would clarify that it is a prudential, not constitutional, limitation. Finally, I endorse a dynamic court, which takes up important constitutional questions when the balance of powers warrant that the federal judiciary assume its jurisdiction and speak boldly.

II. OF MINIMALISM, SHRINKING DOCKET, AND CHANGING COURSE

A confluence of influences has resulted in the Supreme Court doing less rather than more. This phenomenon exists on both the procedural and substantive planes. By constitutional design, the federal judiciary has a limited role. The courts have a passive posture by definition—they may only hear “cases” and “controversies” properly presented as circumscribed by Article III of the Constitution. Within the limited jurisdiction provided, the Supreme Court, final judicial arbiter in the United States, has limited reach. In fact, “[t]he Supreme Court, at the apex of a constantly growing pyramid of lower federal courts that finally decide most federal questions, struggles to manage the articulation of national law.”

Then add that the Supreme Court grants discretionary review for fewer and fewer cases. And the class of cases is shifting away from fundamental rights to the Supreme Court’s “fast-growing business docket.” Should we be concerned? Even if we grant that hearing fewer cases ensures higher quality (certainly not always the case), we should pause to question the pervasiveness and influence of judicial minimalism, of the Court’s open hostility to litigation,\(^8\) and of the shift in classes of cases

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8. Shane & Bruff, supra note 4, at 23.
10. See, e.g., Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (chiding abusive litigation practices and “routine filing of lawsuits” and tightening the pleading standards for private
for which the Court grants certiorari. In this Part, I will first address the meaning and importance of the doctrine of judicial minimalism. Then, I will show the dangers of the Court's overuse of judicial minimalism. For example, rigid adherence to minimalist principles may cause the Court to cripple itself and facilitate a power grab by the political branches of government.

Many current commentators praise methods of restraint, such as minimalism, and their consequences; however, we must first be clear on the contours and roots of judicial minimalism. While judicial minimalism stems from the conservative tradition of Burkean minimalism, modern advocates also include progressives. The approach of judicial minimalism in its simplest form—resolve cases one step at a time—sounds unobjectionable, especially if one appreciates the status quo, certainty, and predictability. Professor Benjamin Zipursky describes the motivations of the doctrine:

What minimalism principally involves as an affirmative matter is a story about the virtues of incrementalism, the risks of any full throttle pursuit of a judicial agenda, the values of stare decisis, and the value of giving time and space to difficult social problems so that other institutional forces better suited to producing broad answers can develop some approach over time.

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11. Cass R. Sunstein, Burkean Minimalism, 105 Mich. L. Rev. 353, 356 (2006) ("Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices."). In this article, one of Professor Sunstein's goals is to show "that Burkean minimalism is a plausible response to limited information and bounded rationality on the part of the federal judiciary." Id. at 356 n.11. Professor Sunstein offers this argument in response to Judge Posner's skepticism of the adoption of Burkean minimalism to judicial philosophy. Judge Posner previously argued:

[Y]ou cannot just admire Burke and think you have found a judicial philosophy.

Prudentialism is the repeated sounding of a note of caution (repeated, not consistent—a consistently cautious person would be cautious about caution as well as about everything else), and a tune with one note soon becomes tedious.


Accordingly, the justifications for judicial minimalism include attractive judicial goals such as respecting precedent and recognizing the inherent limits on the judiciary's ability to cure societal ills.

Yet, a minimalist approach is not without consequence. As Professor Zipursky points out, "there is a kind of risk aversion built into minimalism that, in other areas of life and law, is regarded as non-optimal because, while it removes certain large negatives, it also removes certain large positives." On balance, the federal judiciary may determine that the risk is worth the benefits of restraint, especially given that the political branches are best suited to accomplish large positives. But, what if the Court confronts large negatives as a result of collective political branch action that threatens constitutional rights? The Court may need to brandish the power of potential judicial review not cabined with strict, minimalism boundaries.

There is a distinction between the Court having freedom to act in non-minimalist ways and actually acting in a non-minimalist fashion. To be clear, this Article is not advocating that the Court always, or even often, act boldly. I am positing that the Court needs the flexibility to address grave imbalances of power. The political branches must believe that the federal judiciary serves as a bona fide check on their political power. It is critical that doctrines of restraint, such as political question and judicial minimalism, do not hamstring the Court's ability to appear, and when necessary actually serve, as a check.

When the Court serves as an actual check, its judicial review may result in the significant determination that the will of the people, as implemented by Congress, is unconstitutional. Striking legislation is not an act the Court does, or should, take lightly. Judicial minimalism may aid in avoiding such counter-majoritarian rulings—invalidating legislation and executive action resulting from the democratic process. The concern stems from the reality that members of the Court, unlike members of Congress and the President, are appointed rather than politically elected, and thus the Court thwarts the will of the people when it strikes legislation. Judicial minimalism does not prohibit invalidating unconstitutional laws; it dictates that jurists decide only the case at bar and do no more than necessary. Accordingly, judicial minimalism is not the antidote for preventing counter-majoritarian rulings.

14. Id. at 3003.
16. Id.
17. SUNSTEIN, ONE CASE AT A TIME, supra note 12, at x.
Minimalism may be desirable on the simple basis that any governmental body should act with restraint in exercising its power. Given judicial minimalism’s restraint focus, it also includes or harmonizes with other doctrines of judicial avoidance such as abstention and political question. Consider, however, the following troubling logic:

[B]ecause Burkean minimalists tend to value the passive virtues, eschew political questions, and emphasize the Article III requirements of actual cases and controversies—standing, ripeness, and injury—perhaps neither the declining size of the Supreme Court’s docket nor the Court’s increased attention to business matters, should cause concern or catch us by surprise.18

Although we may not be surprised, we should be concerned. The Supreme Court represents a limited, special resource for judicial review. If the Court opts to allocate its limited time and significant force to business disputes in lieu of other matters, we should at least pause to examine if the Court has abdicated an important component of its role in our constitutional democracy. At a minimum, we should move forward with our eyes open to the consequences.

Jurisprudentially, judicial minimalism may pose a dangerous and false cabining effect on jurists. Minimalism places them into a box; one wall is formed by the jurist’s perception that she is unable to reach an optimal and logical result because judicial minimalism begins to appear as a “marching order” rather than a guiding principle.19 Inside the box, jurists are encouraged to clothe their opinion in the language of minimalism or show signals of conformity through limited action. In the ideal model, the jurists would act in good faith and operate in compliance with minimalism to justify its ruling and to fend off critics. The temptation from another wall of the box is to feign restraint, and an opposing wall tempts a jurist to accuse the competing opinion with failing to adhere or feigning.

In the plurality decision in Hein v. Freedom from Religion Foundation, Inc.,20 the Court acted in a limited (and flawed) fashion under the bounds of an apparent minimalist jurisprudence. The Hein plaintiffs maintained that the Executive’s expenditures for faith-based programs and conferences that included religious imagery, for example, violated

the First Amendment’s Establishment Clause. The Court addressed whether plaintiffs satisfied Article III standing requirements based on paying federal taxes. Traditionally, generalized grievances, including challenges brought by virtue of paying status, do not satisfy standing requirements. The plaintiffs alleged satisfaction of standing requirements pursuant to the Court’s *Flast v. Cohen* taxpayer standing exception. The plurality concluded that the plaintiffs lacked standing because they did not fit into the *narrow Flast* exception. On a strict reading, the Court reasoned that *Hein* was distinguishable from *Flast* because *Flast*’s purported Establishment Clause violation “was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate” and because these facts established the requisite “logical link between [their taxpayer] status and the type of legislative enactment attacked.” In contrast, the *Hein* expenditures, according to the plurality, “were not made pursuant to any Act of Congress[,] [r]ather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities.” Thus, unlike *Flast*, “Congress did not specifically authorize the use of federal funds to pay for the conferences” challenged in *Hein*, but rather, such events “were paid for out of general Executive Branch appropriations.” It was upon this distinction that the *Hein* plurality resolved that the plaintiffs lacked standing. Notably, the Court declined the opportunity to overrule *Flast*. Instead, Justice Alito’s plurality opinion declined to “expand[…] the limit of its logic;” rather, it declared, “We leave *Flast* as we found it.”

21. Id. at 2559.
22. Id.
23. Id.
24. 392 U.S. 83 (1968). In *Flast*, the Court permitted a narrow exception to the general prohibition against federal taxpayer standing. Id. at 102–03. The Court found the standing requirements were met by the taxpayer-plaintiff who challenged a law that distributed federal funds to religious schools in an alleged violation of the Establishment Clause. Id. In addition to Article III’s traditional standing requirements, the *Flast* Court ruled that to qualify for a taxpayer standing exception, “the taxpayer must establish a logical link between that status and the type of legislative enactment attacked” and “the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.” Id. The *Flast* Court held that the plaintiffs satisfied both of these prongs and thus possessed standing to sue in federal court, claiming that the Establishment Clause posed a limit on Congress’s taxing and spending power and that Congress’s legislation funding religious schools violated the Establishment Clause. Id.
26. Id. at 2565–66 (brackets in original).
27. Id. at 2566.
28. Id. at 2559.
29. Id. at 2571–72.
30. Id. at 2571.
31. Id. at 2572.
He further emphasized, “We decide only the case at hand.” But a bolder and more logical decision in favor of expanding taxpayer standing or overruling Flast’s taxpayer standing exception would have been a judicially wiser result.

Justice Scalia’s dissenting opinion in Hein demonstrates how confounded he is with the plurality’s solution and his disdain for the guise of minimalism as, ostensibly, the leading principle:

Why, then, pick a distinguishing fact that may breathe life into Flast in future cases, preserving the disreputable disarray of our Establishment Clause standing jurisprudence? Why not hold that only taxpayers raising Establishment Clause challenges to expenditures pursuant to the Elementary and Secondary Education Act of 1965 have standing? That, I suppose, would be too obvious a repudiation of Flast, and thus an impediment to the plurality’s pose of minimalism... Any last pretense of minimalism—of adhering to prior law but merely declining to “extend” it—is swept away by the fact that the Court’s holding flatly contradicts Kendrick.

The point is that judicial minimalism is fine as simply another jurisprudence that blends in the background for a judge to follow. The deeper adoption, especially by Supreme Court Justices, however, may create an unhelpful limitation in some cases as well as a trap where jurists waste energy discussing the level of true and feigned adherence to the doctrine rather than focusing on the merits. Judicial minimalism, even acknowledging some of its beneficial attributes, should not be a marching order for the federal judiciary. Any focus on the Court’s captivation with minimalism is distracting if it clouds the judgment of jurists as they attempt to reach, and optimally resolve, the substantive merits for the instant and future cases. Like any useful doctrine, if taken to an extreme, it loses its salience:

Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason.

32. Id.
33. 392 U.S. 83 (1968).
35. Hein, 127 S. Ct. at 2580 (Scalia, J., dissenting) (emphasis added).
36. Id. at 2582 (Scalia, J., dissenting).
The difficult, yet necessary, discussion involves the question, "when is restraint appropriate?" The discussion must recognize that the context matters. Further, the doctrine of minimalism will not provide the right answer in every given conflict. Professor Neil Siegel wisely maintains that restraint is appropriate at some, but not all, times. For example, he suggests that restraint may be advisable "when legislatures are expressing social ideals in ways that do not conflict with fundamental constitutional values" and "when the social problem at hand is difficult to address effectively and the consequences of judicial intervention are highly uncertain." He also emphasizes the danger in the judiciary disrupting the delicate balance of powers in a time of strife and calls for "the path of statesmanship." Accordingly, he contends that

conflict avoidance, at least for the time being, may be the path of statesmanship, as when the country is bitterly divided and legal intervention at that moment might increase balkanization and thwart vindication of the very values that would justify the intervention.

Yet, the prudential restraint of a diplomat will not always be the proper path for the federal judiciary. In fact, the appropriate role for the Court may require facing conflict. According to Professor Siegel, in these moments,

judges can best accomplish the preconditions and purposes of law for which judicial statesmanship is responsible by intervening in the right sort of way: by acknowledging conflict, not avoiding it. The situation may require decisive action in the wake of such acknowledgment, or it may require efforts to ameliorate conflict—or at least to keep it to a manageable level—through crafting law that to some extent reflects the values of each side.

Our analyses must incorporate and extend this debate to determine the appropriate uses, and limits, of judicial minimalism. Certain moments, especially in asymmetric times, will dictate that the federal judiciary confront conflict, conduct judicial review, and, where necessary, correct the course of our constitutional democracy.

Judicial minimalism, with its sister doctrine of avoidance, is not the panacea. The benefits include predictability, certainty, respect for coordinate branches, and gradual change. Minimalism seeks to ensure that the political branches, rather than the courts, are seen as the path to large change. Such goals are laudable and may be worth setting one's judicial sights on much of the time. But we should not follow the path

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38. Id.
39. Id.
without question. These doctrines of restraint as a global approach limit the Court’s ability to handle the myriad of unforeseen issues that may arise. Simply put, certain controversies warrant the Supreme Court confronting the conflict and speaking clearly and, perhaps, more than incrementally.

III. A JUDICIAL DYNAMISM MODEL FOR AN ASymmetric WORLD

The overarching model for the Court should be dynamic. The Court must have the flexibility to adapt to changing times such that it may ideally manage its docket and optimally resolve the merits of cases that are most worthy of resolution. A fundamental tenet of our judicial system is that like cases should be treated alike. To be clear, I am not disagreeing with this central tenet to justice. Following the call of fairness and equality, however, does not command that all classes of cases be treated the same or that one jurisprudence govern all matters. The Supreme Court’s three levels of scrutiny acknowledge this reality.

Scholars critique inconsistent application of judicial philosophy, but in truth we only seek consistent application of doctrines that we advocate for or that we believe lead to just results. Thus, I have no problem with Justice Clarence Thomas’s inconsistent application of originalism principles to affirmative action cases. Consistency of judicial philosophy matters (i) across like cases and (ii) to the extent that a jurist claims superiority in reasoning based upon claimed adherence to a chosen doctrine. For my purposes here, the reader need only agree with the noncontroversial principle that certain classes of cases may require unique treatment.

Jurisprudential consistency may not be a primary goal for justices under a particular confluence of features. A jurist may need an ebb and flow to her jurisprudence depending upon the nature of rights at stake and the context of the decision making. The judge will always have some institutional bounds, including both norms and the deterrence of public opinion. Jurists must also consider the effects on the overall narrative of the Court as a continuing body that legitimizes the rule of law.


41. Ronald Dworkin, Law’s Empire 218–32 (1986) (analogizing judges to chain novelists who create one unified novel through caselaw); see also Siegel, supra note 37, at 1032 (“But because law is an institution that must account for the conditions of its own legitimation and because expressing social values and sustaining social solidarity are basic purposes of law, the practice of judicial statesmanship must define a virtue in the role of a judge.”).
A judicial dynamism model is workable as an overarching theory because it fosters tailoring to the issues and to the times. The danger of abuse of power remains in light of the inherent flexibility of such a model.\textsuperscript{42} I am willing to place a great deal of faith in the federal bench. The system will not work perfectly, but it will foster less posturing regarding faithful adherence to a chosen judicial philosophy and greater reasoned elaboration on the merits.\textsuperscript{43} Further, the times warrant it.

The post-9/11 world presents an altered landscape that is asymmetrical. Previously, it was widely viewed that there were two states of security for a nation: war or peace. This outlook constituted a binary view of the prevailing security environment. Now, the Court has to articulate its posture in an era where there is not a clearly defined status of war and peace. War no longer has a clear end. The United States is involved in a global war on terror without a finite timeline or an easily defined enemy. Thus, the threats and responses are asymmetrical. The binary view is no longer applicable, yet the binary view continues to inform judicial decisions, which tilt toward viewing the Executive from a wartime footing.

Earlier in American history, it was possible for the Court to wait for the dispute to subside so as not to interfere with the Executive’s ability to wage war. For example, President Lincoln overreached during the Civil War, but the time lag allowed the Court to avoid acting in the middle of the national crisis. Now, in a non-binary existence, we have a new context where the administration is waging a new kind of war: one that is nonstop, in multiple countries, and against terrorist groups rather than nation-states. We have no peace treaty with Al Qaeda. In the binary view, peace and war are declared. This model does not apply to the current climate. For example, the Defense Department is implementing a new theory of war, “Phase Zero,” which is not used to govern conflict but instead to “shape” environments so as to prevent conflict.\textsuperscript{44} Such

\textsuperscript{42} Of course, “[a]nthing taken to an extreme . . . can corrupt.” Siegel, supra note 37, at 991 (admitting this truth for his theory of judicial statesmanship).

\textsuperscript{43} Joel Feinberg, \textit{Law from the Perspective of the Judge—The Dilemmas of Judges Who Must Interpret “Immoral Laws,”} in \textit{Joel Feinberg & Jules Coleman, Philosophy of Law} 118 (6th ed. 2000) (describing as one of a judge’s choices when faced with an immoral law: “he may cheat, [and] state that the law is not what he believes it to be, and thus preserve an appearance (to others) of the conformity to law and morality”).

\textsuperscript{44} See Charles F. Wald, \textit{New Thinking at USEUCOM—The Phase Zero Campaign}, 43 JFQ 72–75 (2006), available at http://www.ndu.edu/misspress/jfq_pages/editorials/143/20%20JFQ43%20Wald.pdf (describing the “deliberate strategy of engagement,” known as Phase Zero, as the “new thinking and new understanding” with a “theater security cooperation” that involves “fighting the war on terror using a new approach, focusing on terrorism’s longer, underlying conditions [that] in truth it is much more than just a new phase of systematic campaign planning; it is a new form of campaign in and of itself.”); see also U.S. Spectrum of Operations PowerPoint, \textit{The Web of Military}
creative programs will raise new questions of constitutionality. The Executive has the authority to exercise heightened power during wartime but should not backdoor fundamental, permanent changes in the power balance among the branches. The Court will have to analyze the bounds of such powers and will likely be unable to wait for a definite end to the conflict. These tough questions exist under the current unitary executive theory and may morph into other positions under the new administration as it determines how to wage the global war on terror. The Court has to articulate a phase type of approach or the Executive benefits from an “at war” approach. The justiciability doctrines must evolve.

Justice Kennedy’s majority opinion in Boumediene v. Bush acknowledges the uniqueness of the terrain:

Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of the war powers undefined. If, as some fear, terrorism continues to pose dangerous threats for us for the years to come, the Court might not have this luxury.

He further warns that the branches can avoid a separation-of-powers collision if “[t]he political branches consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.” The terrorism context, which Justice Scalia’s dissent echoes as a parade of horribles, combines with rapidly changing technologies to form reason enough to revisit the doctrines of justiciability—including abstention and political question. These and other doctrines of self-restraint cannot remain static.

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Operations (quoting General Peter J. Schoomaker, CSA: “War is both a physical reality and a state of mind. War is ambiguous, uncertain, and unfair. When we are at war, we must think and act differently. We become more flexible and more adaptable. We must anticipate the ultimate reality check—combat.”) (PowerPoint on file with author).

45. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring).

46. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008). In Boumediene, the Court addressed the Military Commission Act of 2006, which stripped federal court jurisdiction over habeas corpus petitions for Guantanamo detainees held as “enemy combatants.” Id. at 2242. The Court viewed the jurisdiction-stripping provision as an impermissible suspension of the writ of habeas corpus given its failure to provide adequate substitutes for the writ, and thus the suspension was beyond Congress’s power over federal court jurisdiction. Id. at 2240. Specifically, the 5-4 opinion, authored by Justice Kennedy (joined by Justices Stevens, Ginsburg, Breyer, and Souter) articulated a separation of powers functional test. Justice Scalia, dissenting, chided the Court for its unprecedented extension of habeas corpus rights to “alien enemies” and for its “judicially brainstormed” principles regarding the functional test for separation of powers. Id. at 2307 (Scalia, J., dissenting).

47. Id. at 2277 (emphasis added).

48. Id. at 2294–307 (Scalia, J., dissenting).
A judicial dynamism model will foster reexamination. Judicial dynamism should occur on both an individual and institutional level. Dynamism has meaning in both contexts: (1) "vigorously and forceful quality—a vigorously active, forceful, and energizing quality, especially as the hallmark of somebody's personality or approach to a task" and (2) "theory of forces—a philosophical or scientific theory stressing the role of dynamic forces in explaining phenomena, especially by interpreting events as an expression of forces residing within the object or person involved."\(^\text{49}\)

Professor Owen Fiss calls for a "robust use of the judicial power" always, but especially in times of terror.\(^\text{50}\) Professor Fiss maintains that a robust judiciary furthers deliberative democracy in a vibrant way through the Court's interpretation of our constitutional values. According to Professor Fiss,

> robust use of the judicial power—one that projects a clear unqualified view of the requirements of the Constitution—will further, not diminish, public deliberation and thus democratic values. Such a use of the judicial power does not preclude further action by the political branches, but rather sets the limits of that action and thus provides the framework for their continued deliberation.\(^\text{51}\)

Professor Cass Sunstein, an "apostle of judicial minimalism,"\(^\text{52}\) rejects this position as that of a "liberal perfectionist" who wishes the judiciary to use broad power to attain the ideal values of progressives. I do not go as far as Professor Fiss, but, as discussed supra, I also reject judicial minimalism as a strategy for all seasons, especially when used as a political expedient.\(^\text{53}\) Judicial dynamism, unlike a robust judiciary, does not dictate that the Court always maximize its power. Rather, it gives the Court the flexibility to respond as needed, given the circumstances. A flexibility the Court may need when confronting an ostensibly political question.

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\(^{50}\) Owen Fiss, The Perils of Minimalism, 9 THEORETICAL INQUIRIES IN LAW 643, 659 (2008).

\(^{51}\) Id.

\(^{52}\) Id. at 663.

\(^{53}\) Professor Scott Gerber raises an interesting observation on this point. He characterizes the increased popularity of judicial minimalism as a "judicial Brezhnev doctrine" in that a subsection of the liberal academy perceives it may not win, so it wishes to say: "What we have, we keep." Scott D. Gerber, The Court, the Constitution, and the History of Ideas, 61 VAND. L. REV. 1067, 1082 (2008).
IV. THE POLITICAL QUESTION DOCTRINE AS PRIMARILY A PRUDENTIAL CONSTRAINT

The Supreme Court has not clarified whether the political question doctrine is a constitutional or a prudential restraint.\(^54\) In its modern form, the political question doctrine is primarily prudential for two reasons. First, almost all of the judicially created political question factors have no constitutional grounding. Second, the motivations for all but one of the factors include prudential considerations such as judicial (i) competency, (ii) functionality and administration, (iii) legitimacy, (iv) reputation, and (v) comity toward the political branches. Such prudential concerns serve important justifications for jurisdiction-limiting devices of the federal judiciary. This Article maintains, however, that the political question limitation on jurisdiction, as primarily prudential, should not serve as an insurmountable barrier when the federal judiciary is needed to address an asymmetric threat to the balance of powers.

The modern political question doctrine does not clearly emanate from the Constitution. Article III sets forth the cases and controversies over which federal court jurisdiction is proper. The Article does not exclude political question matters. Article III does not utter the words “political question” or allude to such a prohibition. There is no laundry list of excluded matters in general or specific terms. For example, Article III does not state that the federal judiciary cannot exercise jurisdiction over Senate impeachment trial proceedings of a federal judge.\(^55\) Further, the Court has not developed the political question doctrine as an interpretation of Article III’s confinement of judicial power to “cases” and “controversies.” Nevertheless, even where jurisdictional and other justiciability requirements are met, the Court has declined to review particular constitutional challenges to governmental action. The Court determines that the political branches, legislative and executive, should resolve these cases. Accordingly, the Court deems these cases nonjusticiable on the basis of the political question doctrine.

The political question doctrine exists as a conventional tool for the federal judiciary’s limitations on jurisdiction. The limiting doctrines of justiciability include the prohibition on advisory opinions, standing, ripeness, mootness, and political question.\(^56\) Most of these doctrines are not absolute conceptually. For example, ripeness represents the notion of

\(^{54}\) CHEMERINSKY, supra note 7, at 45.

\(^{55}\) The Supreme Court, however, found a federal judge’s constitutional challenge to Senate impeachment proceedings a nonjusticiable political question. Nixon v. United States, 506 U.S. 224 (1993).

“not yet,” the case is not ready for adjudication; mootness represents the
notion of “too late,” the controversy is no longer justiciable.57 Even
standing, which communicates “not you,” implies that the Court would
hear the action if brought by a proper plaintiff rather than that the Court
will “never” hear the controversy.58 The political question doctrine,
however, if deemed applicable by the Court, means the Court will never
hear the case.59 The Court has found jurisdiction to be inappropriate pur-
suant to the political question doctrine in cases involving the following
areas: foreign affairs,60 the impeachment process,61 the republican form
of government clause, and the electoral process.62
By not hearing constitutional challenges that the Court deems non-
reviewable political questions, is the Court abdicating its duty? The
answer depends on whether one views the political question doctrine as
stemming from a constitutional command, prudential considerations, or
both. Although Article III does not exclude political question cases from
federal judicial power, another source for a constitutional constraint is
the separation of powers. The structure of the Constitution divides
power in a tripartite fashion between the legislative, executive, and judi-
cial branches, and dictates that one branch not encroach upon another.
Accordingly, if the matter is textually committed to a branch other than
the judiciary, the Court must stay its hand.63 Even granting that certain
political question cases are nonreviewable as a separation-of-powers
command, the Court has extended the political question doctrine well
beyond the constitutional prohibition.
The expansion of the doctrine includes largely prudential concerns
regarding judicial functionality and legitimacy. These concerns morph
into judicially created, clunky factors. It is difficult to predict their
application, but the purpose is apparently to give the Court an avenue to

57. Id. fig.2-1.
58. Shane & Bruff, supra note 4, at 107 n.1 ("[A] standing holding only says ‘not you,’
instead of ‘never,’ leaving the other branches to wonder whether the Court might someday find a
suitable plaintiff if sufficiently tempted to do so.").
59. If one adopts a political question doctrine that is flexible to the context, it would be
possible for the Court to apply the doctrine to a case and mean “not in this instance but perhaps later
if the times warrant it.”
60. See, e.g., Commercial Trust Co. v. Miller, 262 U.S. 51 (1923) (leaving to the political
branches the issue of when war begins and ends); Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918).
trial a nonjusticiable political question based on Article I’s textual commitment of impeachment to
the Senate).
62. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding that the Constitution
committed to Congress the issue of which government is the established one).
63. The federal court considers whether determination of the case is “a textually demonstrable
constitutional commitment of the issue to a coordinate political department.” Baker v. Carr, 369
defer to the political process as a matter of wise judicial administration and interbranch comity. The modern political question doctrine, as enunciated by the Supreme Court, includes additional factors—any one of which may result in the Court declining review:

- "lack of judicially discoverable and manageable standards for resolving it";
- "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion";
- "impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government";
- "unusual need for unquestioning adherence to a political decision already made"; and
- "potentiality of embarrassment from multifarious pronouncements by various departments on one question."\(^64\)

In *Marbury v. Madison*, Chief Justice Marshall narrowly articulated non-reviewable political questions as cases centering on the Executive's exercise of discretion; he explicitly excluded political questions raising individual constitutional rights.\(^65\) In its modern form, the political question doctrine extends far beyond Chief Justice Marshall's vision. The doctrine notably covers cases in which individuals raise concrete constitutional injury.

In 1993, for example, former federal Judge Walter Nixon raised a constitutional challenge to the Senate's impeachment proceedings against him.\(^66\) He sought to challenge a Senate rule allowing a committee of Senators to hear evidence against an impeached individual and report to the full Senate. Nixon claimed the rule violated the Impeachment Trial Clause, Article I, Section 3, clause six, which authorizes the Senate to "try" all impeachments.\(^67\) The Court found the challenge to be a nonjusticiable political question because the issue involved "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it."\(^68\) Thus, the Court denied itself the power to hear the case.

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64. Id.
67. Id. at 228.
68. Id.
The Court’s reasoning, however, is questionable. Viewing these two political question factors as linked, the Court reasoned that the Constitution’s text—“try” and “sole”—demonstrated the textual commitment of authority to the Senate and the word “try” lacked manageable standards for judicial resolution. The latter issue evidences a prudential concern. The Court also found further prudential support, “counsel[ing] against justiciability,” based on “the lack of finality and the difficulty of fashioning relief.” The only arguable constitutional basis for declining review is the notion that the Constitution’s text commits the issue exclusively to the Senate and that review by the judicial branch therefore would violate the text and the separation of powers. The Court’s constitutional interpretation that the text precludes judicial review, even if the Senate has the sole authority to try impeachments, does not show bullet-proof logic.

Justice White’s concurring opinion poses a reasonable, persuasive interpretation of the constitutional text—Article I does not render “final responsibility for interpreting the scope and nature” of the impeachment power to the Senate. Accordingly, although the Constitution authorizes the Senate “the power to try impeachments,” neither the text nor the history negates judicial review authority. On the merits, Justice White concluded that the Senate had met its constitutional obligation to try Nixon. The Nixon case did not occur in asymmetric times and thus did not warrant federal judicial action in order to check joint action of the political branches as discussed below. Accordingly, prudential reasons such as proper judicial functioning and legitimacy may still have warranted the Court’s finding of nonjusticiability. A finding of justiciability, coupled with Justice White’s recommended substantive ruling, however, would not have disrespected the Senate or impermissibly encroached into its sphere of power.

Regardless of disagreements about the proper application of the political question doctrine in any given case, the doctrine maintains its resiliency as a limiting device. Scholarly and judicial support for the political question doctrine stems from a concern about the federal judiciary’s delicate institutional legitimacy. Federal court legitimacy

69. Id. at 228–29.
70. Id. at 228–32, 236.
71. Id. at 236.
72. Id. at 240 (White, J., concurring) (Blackmun, J., joining).
73. Id. at 243.
74. Id. at 250.
75. See, e.g., BICKEL, supra note 15, at 184 (justifying the political question doctrine on, inter alia, “the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from”); see also Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter,
has evolved far from its fragile roots. Critics of the political question doctrine discredit this faulty assumption and maintain that any invocation of the political question doctrine threatens the federal judiciary’s duty to exercise judicial review when it matters most.\textsuperscript{76} This threat is arguably at its greatest when individuals claim concrete violations of constitutional rights based upon political branches exceeding their authority in concert.\textsuperscript{77}

Assuming the Court is not yet convinced or prepared to eliminate the political question doctrine, it should lean toward embracing, rather than avoiding, certain confrontations posed in asymmetric times. This shift should occur even for cases evidencing separation-of-powers tensions. In fact, the possibility of interbranch conflict may make judicial review all the more imperative. The following Part articulates a standard by which the Court may determine when judicial review matters most, when the Court should review even a political question.

V. A THEORY OF JUDICIAL NONABDICATION IN ASYMMETRICAL TIMES

In asymmetrical times, the Court should pay particularly close attention when the Executive exerts increased power and Congress acquiesces. Specifically, when the other two branches of government are in agreement, there may be a heightened need for judicial review to protect constitutional rights and ensure proper checks and balances. This more watchful eye would not focus, however, on every occasion when the President signs a federal bill into law. Instead, the need for the judiciary’s higher vigilance arises when the political branches jointly exert power in the name of exigency borne of crisis.

Alexander Bickel’s “passive virtues” conception empowers the Supreme Court.\textsuperscript{78} It empowers the Court not to act. It encourages the Court to avoid jurisdiction and decline review in the name of prudence. Its underlying principles—discretion and prudence—support the prudential, rather than constitutional, conclusion of the political question doctrine. Further, the underlying principles condone avoidance, espe-


cially if separation-of-powers tensions are fierce. I posit that, for a certain class of fierce cases, the Court should lean toward reviewing the case.

Regarding the Supreme Court’s role, Justice Brandeis once commented, “The most important thing we do is not doing.” Justice Breyer echoed this principle to no avail in his impassioned dissent in *Bush v. Gore* when he urged that it was a mistake to take the case. The validity of this bold endorsement of restraint may often be in the eye of the beholder—depending on one’s satisfaction with the outcome in a given case. No doubt there are times when it is critical that the Court stay its hand, but at other grave times it may be critical that the Court act rather than abstain. The difficult issue is when.

Certain components of the Constitution are purposefully broad to allow the flexibility necessary for an evolving democracy. The parameters of the separation-of-powers boundaries, for example, are not explicitly described in the Constitution. As Justice Jackson suggested in his concurrence in *Youngstown*, formalism and categorical imperatives tend not to serve consciously inserted constitutional ambiguities in the separation-of-powers structure. He aptly reasoned,

> As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President’s paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Accordingly, the proper sphere of each branch is not fixed in Justice Jackson’s conception; rather, each branch must retain flexibility to adapt to the posture taken by the other branches.

Justice Jackson’s sentiments apply to the ongoing global war on terror. Although he maintained that the Executive power is greatest when the action receives express congressional approval and lowest

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82. Id. at 654.
83. Id.; see also Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *Fordham L. Rev.* 1931, 1934 (2007) (“Under Jackson’s conception of the separation of powers, the roles of the three branches of government are not rigidly defined, but rather are flexible, shifting to accommodate the positions taken by the others.”).
when the action is in contravention of legislative proscription, he also understood that meaningful congressional oversight might not exist. Specifically, Justice Jackson recognized that the President’s powers include the ability of persuasion over those designed to serve as checks on executive power: “By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”

Times of crisis stimulate expedited, significant political action. The intensity of the crisis may dilute the ability of one political branch to check the other. For example, Professor Amanda Frost examines former President George W. Bush’s repeated utilization of the state secrets privilege as a means for dismissal of civil cases challenging the constitutionality of executive action, and she recommends that where “Congress is unable or unwilling to take on [oversight], then the judiciary’s role in checking executive power is paramount.” Notably, she further advises, “[c]ourts should be particularly hesitant to forgo jurisdiction when the executive is seeking an across-the-board dismissal of all cases challenging particular executive branch programs, because such claims implicate Congress’s constitutional authority, as well as the courts’.”

Although Professor Frost addresses only the executive assertion of state secrets privilege, her focal point shows a prime example of possible congressional acquiescence in executive action that should warrant a heightened judicial responsibility to review the action. I argue that acquiescence occurs when “Congress appears unwilling or unable to inquire into the legality of executive conduct.” The lack of political oversight in conjunction with the gravity and sweep of the Executive’s stance (i.e., dismissal of all cases) warrants judicial oversight. In such circumstances, the Court should reserve the possibility of judicial review, even when, ordinarily, a doctrine of restraint might dictate otherwise.

To clarify when the Court should lean in favor of review, it may help to consider a recent Supreme Court case that arguably fits, but upon closer analysis does not pose the threat I envision. For example, the Court may have subconsciously followed an oversight motivation in

84. Youngstown, 343 U.S. at 637; see also Frost, supra note 83.
86. Id. Notably, Justice Jackson further stated, “I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.” Id. at 655 (footnote omitted).
87. Frost, supra note 83, at 1931.
88. Id. at 1934.
89. Id. at 1958.
90. Id. at 1962.
Massachusetts v. Environmental Protection Agency, but the underlying facts of this standing case involved the political branches’ coalescing in their non-action.

The Court, in a 5-4 decision by Justice Stevens, ruled the case justiciable and controversially found that the state of Massachusetts established standing; the Court reasoned that the procedural right in the Environmental Protection Act, coupled with the state’s “stake in protecting its quasi-sovereign interests,” warranted “special solicitude in the [Court’s] standing analysis.” Thus free to reach the merits, the Court ruled that the Equal Protection Agency acted arbitrarily in its refusal to determine whether greenhouse gases contribute to climate change.

In dissent, Chief Justice Roberts asserted that the majority creates a “new theory” that “dilutes” the Article III standing requirement to a vanishing point. Further, Roberts opined that the purpose of the litigation may have been “more symbolic than anything else” and, accordingly, the Court’s grant of jurisdiction violated the Court’s proper role by “serv[ing] as a convenient forum for policy debates.” Is this case an example of a power grab by the Court, acting in the face of non-action and in a time of environmental crisis? That is a question for another day. This case may raise an unusual example of the political branches acting in concert to use power to not act. The Court must be careful to maintain Article III’s standing requirements despite the exigencies. Regardless of any possible critiques of the Court’s standing analysis, Massachusetts v. Environmental Protection Agency does not pose an instance in which the Executive and Congress affirmatively acted in concert to deprive concrete constitutional rights of individuals. Further, this case does not pose the threat of the political branches seeking to insulate themselves from judicial oversight, as did the States Secrets Cases or the military detainee cases.

In order to appreciate when the judiciary should lean toward review, consider how interbranch alignment might affect the political question analysis as described in the following two scenarios. In scenario one, litigation challenges federal government action in which Congress and the President have acted in concert in a manner that impli-

92. Id. at 520.
93. Id. at 534.
94. Id. at 540–41 (Roberts, C.J., dissenting).
95. Id. at 547.
96. Frost, supra note 83, at 1963 (proposing that the judiciary stay the State Secret Cases and try to delegate oversight back to Congress and thus prevent the ability of “the executive to evade the oversight our tripartite system of government generally requires”).
icates grave constitutional values. In scenario two, litigation challenges federal conduct implicating grave constitutional values, but Congress and the President take opposing positions. Justiciability doctrines of restraint, such as political question, should adapt differently to these scenarios. The prudential calculus could reasonably be expected to be sensitive to the distinct concerns raised.

In scenario one, the political risk for the Court is higher because both political branches are moving in one direction. But in that circumstance, the Court may be the only institutional actor that is in a position to uphold the limited powers enumerated in the Constitution. An example of such concert action arose with the detainee legislation in which “Congress became a full partner of the President in this front of the ‘War on Terror.’”97 The bold power assertions of the Executive Branch combined with the acquiescence of Congress dictated that the Court not avoid the conflict. In Hamdan,98 the Court found that the military commissions instituted by President Bush violated federal law and the Geneva Conventions.99 Although the Court reached the merits, it avoided a thorny interbranch conflict with Congress by interpreting the Detainee Treatment Act’s jurisdiction-stripping provision as not applicable to Hamdan’s pending case.100 The Hamdan Court instead chose to signal to Congress: if you intend to strip jurisdiction and suspend the writ of habeas corpus, be clear.101 In Justice Scalia’s dissent, joined by Justices Thomas and Alito, he reasoned that the majority opinion’s finding of jurisdiction was “patently erroneous” because the plain language of the Act as well as Court precedent established that the Act applied to all pending cases, including the instant Hamdan case, before the Court.102 The majority’s strained analysis demonstrates that the Court would rather not unnecessarily confront Congress regarding Congress’s control over federal court jurisdiction.

97. Fiss, supra note 50, at 647.
98. Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Of the eight participating Justices, a five-justice majority concluded that the military commissions established by President Bush’s administration to try suspected al Qaeda terrorist members were not authorized by federal law, not required by military necessity, and violative of the Geneva Conventions.
99. Id.
100. Id. at 584 & n.15. After extensive statutory construction of the Act regarding whether its jurisdiction-stripping provision had immediate effect upon all pending cases, the Court found jurisdiction proper because the Act, despite its effective date on the date of enactment, was silent on whether the jurisdiction-stripping provision applied to pending cases in contrast to other provisions expressly applicable to pending matters. Id. at 576–84.
101. Id. at 636 (Breyer, J., concurring) (noting “the limited nature of the Court’s decision” and stressing “that the Court had done no more than declare that Congress had failed to grant the President the authority to create the kind of commission . . . . Nothing prevents the President from returning to Congress to seek the authority he believes is necessary.”).
102. Id. at 655 (Scalia, J., dissenting).
The majority’s signaling, however, resulted when Congress passed the Military Commissions Act to clarify its purposes. In *Boumediene*, the Court finally found an unconstitutional suspension of the writ, but at what constitutional costs in the interim? The Court’s interpretation was essential to correcting the course of the political branches. Justice Kennedy viewed that the separation-of-powers doctrine was strengthened through the Court’s review of the Executive’s authority to imprison a person, and, thus, “the exercise of those [executive] powers is vindicated, not eroded, when confirmed by the Judicial Branch.” The Court declared that it was unwilling “[t]o hold the political branches have the power to switch the Constitution on or off” because “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.” The issue is whether the Court should have acted more clearly and more quickly.

In scenario two, the need for Court safeguarding is less present. If the Court accepts jurisdiction, it will have political cover to the extent that at least one of the political branches will likely be in accord with the Court’s ruling. The need, however, for the Court to accept jurisdiction as a constitutional safeguard is lessened because both Congress and the President will have tools at their disposal for self-help. Such tools include Congress’s spending power, the President’s veto, and Congress’s override. In the conflict scenario, there could be a great need for the Court to step in, but only if the entire system is on the brink of constitutional crisis.

Finally, another special category includes instances in which the two other branches conspire to deprive the Court of its core functions: jurisdiction-stripping cases. In that instance, the Court must preserve its constitutional role as a defensive measure so that it has the capacity to fulfill its function. With that said, Congress does, under Article III,

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103. Fiss, *supra* note 50, at 657 (“We can now readily see the costs of such a minimalist strategy: the cycles of litigation, the hardship on the prisoners, and the resources consumed by the judicial and legislative branches. But what has been gained?”).

104. *Boumediene* v. Bush, 128 S. Ct. 2229, 2277 (2008). Interestingly, according to Justice Kennedy, if history does not answer the question, there were other powerful reasons, including the separation of powers, that warranted the Court finding the suspension of the writ unconstitutional in *Boumediene*. By contrast, Justice Kennedy joins the majority opinion in *Heller*, in which Justice Scalia maintains that the necessary path for interpretation of the Second Amendment is original public meaning. See District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (ruling that the Second Amendment protects an individual right to own a gun for private, not just militia, use). Justice Kennedy viewed the *Boumediene* case in its context of terrorism and strained interbranch tension, which may have led him to act dynamically, rather than rigidly, to resolve that a functional separation of powers would best address the questions raised. The *Heller* case, however, raised a distinct constitutional question not unique to asymmetric times.

possess vast power to alter the jurisdiction of the federal courts. It cannot, however, use that power to extinguish the judicial function by stripping jurisdiction or effectively curtailing the necessary tools for judicial review. The Constitution calls for the Court to be the judge in its own case in that circumstance. If the political branches act in concert to eviscerate the Court’s essential functions, the Court has a duty to preserve itself, strike the legislation, and protect the constitutional interests at stake.  

VI. CONCLUSION

In times of asymmetrical warfare, when separation-of-powers tensions intensify, the Court must act to preserve its essential functions. The Court should not blindly march to the tune of judicial minimalism; rather, it needs a broader, more flexible theory such as judicial dynamism. Such a doctrine enables the Court to engage honestly and to embrace confrontation when necessary. In particular, judicial dynamism permits the Court to reexamine prudential doctrines of restraint such as political questions. When individuals raise concrete infringements of constitutional rights, the Court should analyze the alignment of the other two branches in order to inform the Court regarding which is more prudent—exercising or avoiding review. In particular, the Court’s duty to serve as a check may be heightened when Congress and the President act in concert to exert power based on exigencies and impinge on individual rights. Although the existence of separation of powers tensions places the Court in a precarious position, speaking clearly, and perhaps more than incrementally, to protect the Constitution should be the preferred, if not required, course.

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106. The Court in Boumediene should have more directly addressed the MCA’s jurisdiction-stripping provision.