THE ACT OF STATE DOCTRINE – FROM ABSTENTION TO ACTIVISM

Neil J. KLEINMAN *

1. Introduction

A distinctive attribute of the U.S. federal courts is their power to define and limit their own authority [1]. The act of state doctrine is one expression of this power, used by the courts to limit their authority in matters involving foreign governments [2]. While differences in interpretation and application persist, the doctrine may be simply defined: U.S. courts may not inquire into the validity of the laws of other governments and their acts performed within their territories [3].

In some instances, the state or a closely related administrative or commercial entity of the state [4] is the litigant claiming act of state protection. Where neither the state [5] nor one directly related to the state claims protection [6], application of the doctrine rests on the theory that the alleged culpability was the result of state action [7] that cannot or should not be examined under the doctrine. Thus, the act of state doctrine also effectively bars actions against private parties who are able to establish that their acts were required by the state [8].

The doctrine is interwoven with statements of respect for the independence owed every sovereign state [9], but it is more an expression of “the basic relationships between branches of government in a system of separation of powers” [10]. Hence, the doctrine may be said to incorporate [11] the “horizontal” character of international law, in which “there is no adequate ‘higher law’ available to resolve serious disputes between states”, and the “vertical” character of a “federal state”, in which there is a “structure … [of law] … effective to overcome most conflicts that arise within it” [12].

This article argues that since the Supreme Court’s 1964 decision in Banco Nacional de Cuba v. Sabbatino, the act of state doctrine has neither been interpreted nor applied consistently by U.S. courts [13]. The scope of the act of state doctrine has been seriously questioned [14]. Courts have varied sharply on its application to cases involving economic disputes and government-operated commercial enterprises [15]. Disagreement may spring from the fact that the

* Vice president for academic affairs, Stockton State College, New Jersey.

term "act of state" actually describes not one approach, but three – each with a different purpose which necessitates a different form of analysis.

The first approach, which this article calls the classical approach, directs the court to question its constitutional competence when confronted with international disputes. Courts using this approach tend to accept act of state defenses by emphasizing the principles of federalism embodied in separation of powers concepts [16]. In contrast, courts that refuse to accept act of state defenses [17] subordinate the principles of federalism, emphasizing instead the international interests at stake. The international interests are balanced with domestic concerns before deciding whether act of state considerations should apply [18].

Balancing approaches to the act of state doctrine fall into two categories. One form of balancing, which this article calls "prudential", requires courts to assess the significance of national and foreign interests and the potential effect of judicial relief on U.S. foreign relations. The other type, which this article calls "functional", requires courts to heed pronouncements from the executive branch and legislative "signals" from Congress [19], in addition to weighing the national interests at stake against the interests of the private plaintiff.

The act of state doctrine was created by the judiciary to maintain its autonomy within the federal system and to retain its credibility in a world of conflicting economic ideologies [20]. Hence, the doctrine's utility has become threatened as courts increasingly engage in conjecture about the state of U.S. foreign relations. Prudential balancing, espoused in cases like *Timberlane Lumber Co. v. Bank of America* [21] and *Mannington Mills v. Congoleum Corp.* [22], undermines the act of state doctrine's rationale – that the federal judiciary is competent to evaluate national interests abroad only when international consensus is clear [23]. Similarly, functional balancing, such as that displayed in the plurality opinion in *Alfred Dunhill v. The Republic of Cuba* [24], is no less suspect [25]. Harmonizing [26] the doctrine to complement positions taken by the political branches subordinates the judiciary to these branches.

The act of state doctrine should not be dependent upon the political branches for its content. The courts are not dependent upon the political branches for their power [27]. The doctrine, instead, may be viewed as a judicially constructed barrier between the courts and legislative and executive pressures [28]. The preferred analysis, then, should return to the solid ground provided by the classical approach on which the act of state doctrine is anchored. The doctrine cannot easily be restored, however. The generalizing process has gone far afield since the nearly unanimous Supreme Court in *Banco Nacional de Cuba v. Sabbatino* last defined the doctrine twenty years ago [29]. Absent a clear statement from the Supreme Court addressing the doctrine's constitutional underpinnings, the federal courts will increasingly be drawn into judging economic disputes beyond their constitutional competence.

This article retraces the gradual fracturing of the act of state doctrine, analyzing several recent decisions to show how courts have manipulated the
doctrine to reach desired results. Section 2 summarizes the case law and efforts by the executive and legislative branches to modify the doctrine. Because of the close relationship between the act of state and political question doctrines [30], section 3 applies political question analysis to touchstone act of state decisions, comparing their reasoning with that suggested by the Supreme Court in Sabbatino. The article focuses on several recent cases: Hunt v. Mobil Oil Co. [31], as an example of the classical approach; Dunhill [32], as an example of functional balancing; and the companion cases of Timberlane [33] and IAM v. OPEC [34], both by Judge Choy of the Ninth Circuit, as examples of prudential balancing. Section 4, the conclusion, discusses the implications of the doctrine's current status.

2. Background

2.1. Case law perspective

The seminal decision in act of state jurisprudence is Sabbatino [35], in which the Court faced one of a number of cases arising out of the Cuban government's expropriation of property in 1960. In Sabbatino, sugar sold under contract to a U.S. company was expropriated before being shipped to the United States. The sugar was ultimately shipped after the U.S. broker entered into new contracts identical with those already made. The broker, however, refused to pay on this second contract because he claimed he was also liable under the first, pre-expropriation contract. The Cuban government, through its representative bank, sued and, after judgment against it in the district [36] and circuit [37] courts, the Supreme Court reversed, holding that a judgment in favor of the defendants abused the act of state doctrine, which precluded judicial examination of the validity of expropriation, even if allegedly in violation of international law [38].

The logic of international comity is often distinguished [39], as Justice Harlan did in his majority opinion in Sabbatino [40], from that underlying the concept of separation of powers. Justice Harlan found that the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers". On the other hand, Justice Rehnquist's plurality opinion in Citibank [41] asserted that the act of state doctrine "has its roots, not in the Constitution, but in the notion of comity between independent sovereigns". This appears to be an important distinction, but is little more than a tactical one.

In Citibank, the emphasis on "comity" and the de-emphasis of "separation of powers" allowed Justice Rehnquist to affirm the view that deference to recommendations from the executive branch does not damage the Court's constitutional integrity [42]. In Sabbatino, the emphasis on separation of
powers allowed Justice Harlan to assert the federal nature of the question in order to clarify that claims resulting from expropriation could not be resolved under state law. Justice Harlan's analysis demonstrates how separation of power arguments serve a court that desires to abstain. "[W]hatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided" [43]. And, "[i]f the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of the national interest which the judiciary would be ill-advised to undermine indirectly" [44].

It is important to understand that a relationship exists between the theories of comity and separation of powers which inform the act of state doctrine [45]. A recapitulation of five earlier cases will help. In *The Schooner Exchange v. McFadden*, the Court described the question as one of "the perfect equality and absolute independence of sovereigns, and [the] common interest impelling them to mutual intercourse..." [46]. In *Underhill v. Hernandez*, the Court found that the relationship between independent states required that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" [47]. *Oetjen v. Central Leather Co.* expressed concepts of sovereignty and of separation of powers:

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another ... [must] rest ... upon the highest considerations of international comity and expediency... [48].

... 
The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative -- "the political" -- Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision [49].

*Ricaud v. American Metal Co.* presents the comity principle in terms of conflicts of law doctrine, holding that the act of state doctrine does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.50

*Sabbatino* confirms the doctrine's roots in the separation of powers:

It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations [51].

... 
Its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government ... [52].
Rather than reflecting a progressively changing doctrine [53], taken together these cases represent a common view of the role of judicial power and those responsible for using it. The principles of comity and separation of powers can be reconciled by recognizing that both describe a system of government and law which depends upon a balanced relationship between autonomous and equal "political" partners, each drawing strength and credibility from acts of mutual recognition and deference. This view similarly underlies discussions of conflicts of law, institutional competency, and the relationship between sovereign states.

The formulations of the act of state doctrine in *The Schooner Exchange* and in *Underhill*, although couched in the language of comity, share with *Sabbatino* a commitment to the central federalist premise that the state should be concerned with the distribution of power among those political entities responsible for using it [54]. Thus, in *Underhill*, the principles of federalism focus on the distribution of power among nation-states. The principles remain familiar domestic ones, although expressed in an international context, and include notions of the comity and fairness due legitimate powers [55] and ideas found in traditional choice of law rules [56].

While deftly consolidating a century of case law, the *Sabbatino* opinion opened the door for balancing approaches. Although Justice Harlan affirmed that the act of state doctrine depends on "the proper distribution of functions between the judicial and political branches of government on matters bearing upon foreign affairs" [57], he continued in a more flexible vein, suggesting that the doctrine might allow courts to respond more pragmatically to economic realities.

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.... The balance of relevant considerations may also be shifted.... Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government... in the absence of a treaty or other unambiguous agreement regarding controlling legal principles... [58].

Although this language may only reflect a compromise written to gain support and limited to the facts at issue, it has become the foundation for balancing tests [59].

The purpose of this paragraph is unclear unless it is seen in context, with emphasis on the right words. Only the most self-evident and unambiguous codification of international law would seem to satisfy Justice Harlan's test, for he indicates that absent unambiguous international law the credibility of executive branch diplomacy [60] and the credibility of the courts are at risk.
The evolution of uniform principles of international law is equally jeopardized. He perceived inconsistencies between the requirements of diplomacy and the piecemeal, inflexible nature of litigation. He foresaw a threat to the U.S. marketplace when importers could expect title challenges, especially in expropriation controversies, and predicted a universal suspicion when courts of "the world's major capital exporting country and principal exponent of the free enterprise system" impose standards on nations with different economic and political goals. Nonetheless, significant pluralities of the Supreme Court and lower court judges have embraced the "Sabbatino balancing test". In doing so, some judges have been persuaded that weight should be given to executive and legislative suggestions.

Courts have thus been willing to adopt positions taken by the executive branch towards act of state claims. In Dunhill, for example, a plurality took solace in the fact that the executive branch supported its denial of sovereign status to the "commercial" acts of the Cuban government. In fact, the Court suggested that executive branch support should guide, if not compel, its decisions in act of state questions. Courts react similarly to legislative hints, especially where state acts may be characterized as commercial. Thus, after Congress passed the Foreign Sovereign Immunities Act (FSIA), which incorporated a theory of restrictive sovereign immunity in its definition of federal jurisdiction, some courts began to treat the FSIA as though it modified or even superseded the act of state doctrine.

2.2. Executive and legislative involvement

Executive branch involvement has been a force in defining act of state questions. Some commentators have argued that yielding to the recommendations of the executive branch is itself an affirmation of the doctrine of the separation of powers since the courts defer to the executive branch when they yield. Others contend that application of the doctrine requires guidance from the political branches, but then only when articulated in legislation directed to "categories of disputes rather than in discrete cases" so judicial deference can be balanced by judicial independence.

2.2.1. Yielding to the executive branch

The modern rationale for yielding to recommendations from the executive branch is found in the Bernstein litigation, in which a Jewish immigrant claimed property that had been taken from him through Nazi torture and imprisonment. The Second Circuit Court of Appeals held itself bound by the principles of the act of state doctrine and declined to adjudicate Bernstein's claim, indicating that the competent political branch had not yet acted to relieve the courts from restraint upon the exercise of their jurisdiction. The State Department then published a letter purporting to "relieve American
courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials". In response, the same court reversed its position and denied an act of state defense in a related case [81]. Though a majority of the Supreme Court has never approved the Bernstein Exception and six justices specifically rejected it in Citibank [82], the Bernstein Exception has retained a certain degree of vitality. In Dunhill, for example, the plurality used State Department letters to support its view that denying act of state protection to the Cuban government would not embarrass the executive branch [83]. The Court even suggested that, on the contrary, applying the doctrine in a "purely commercial" context might embarrass the executive branch [84].

Such judicial deference hardly reconfirms the principles of separation of powers. Indeed, such deference mistakes the nature of the act of state doctrine. Deference as a principle of separation of powers requires that the judiciary remain silent when the political branches should act. It does not mean that the judiciary should obey "political recommendation", for, as Justice Powell noted, "... even in cases deemed to involve purely political acts, it is the duty of the judiciary to decide for itself whether deference to the political branches of Government requires abstention" [85].

As Justice Douglas observed, under the Bernstein Exception the judiciary appears to invite political branches to treat it as a "mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others" [86]. Clearly, deference of this kind obviates a doctrine meant to insulate the courts and renders them vulnerable to legislative and executive pressures.

2.2.2. Yielding to the legislative branch

The federal courts have been mixed in their reactions to congressional messages. In swift reaction to Sabbatino, Congress enacted the Hickenlooper Amendment to the Foreign Assistance Act of 1964 [87]. The amendment was intended to limit the freedom of courts to apply the act of state doctrine where an expropriation occurred in violation of international principles [88] regarding compensation for property [89]. The courts have refused, however, to apply the amendment to assets not brought into the United States [90]; to offsetting claims [91]; to oil concessions [92]; and to defenses of sovereign immunity [93]. The fact that the Hickenlooper Amendment did not seriously alter the impact of the act of state doctrine may support a view that the doctrine withstands legislative manipulation.

In contrast, the Foreign Sovereign Immunities Act (FSIA) of 1976 [94] has had a more extensive impact on the doctrine. The FSIA was enacted to extend the jurisdiction of the federal courts over a variety of cases involving foreign states [95], in particular those in which the foreign state engaged in commercial activities [96]. The FSIA basically incorporates principles reflected in the plurality opinion in Dunhill which had previously been embraced by the State
Department in the “Tate letter” of 1952 [97]. While the FSIA does not bear directly on the act of state doctrine, some courts have been persuaded that it altered the doctrine by incorporating principles of restrictive sovereign immunity [98]. Others have held [99] that questions of jurisdiction and justiciability are unrelated and that Congress made no connection between the two [100]. For the latter group, sovereign immunity remains a principle of international law, and the act of state doctrine remains a strictly domestic legal principle arising from the peculiar role of U.S. courts [101]. They perceive that sovereign immunity defines the scope of a court’s jurisdiction, while act of state doctrine responds to the different question of justiciability [102]. Under the act of state doctrine, a court does not inquire into the state’s purpose in acting [103], while under the FSIA the “nature of the act” test embodied in the commercial activity exception makes the state’s purpose relevant [104].

3. Three models of the act of state doctrine

3.1. Overview

The logic and the heritage of the act of state doctrine are linked with those of the political question doctrine [105]. Despite debate [106], it is not settled that the two doctrines spring from the same constitutional source [107], require the same analysis [108], or whether either doctrine is mandated by the Constitution or merely discretionary [109]. Both doctrines, however, clearly draw strength from the constitutional principles underlying the three-branch structure of the U.S. government [110].

Both doctrines depend on the ability of the courts [111] to adjust the boundaries separating the three branches when such adjustments are necessary to maintain a balance among equals. Consequently, the judiciary’s duty is to set limits for itself as well as for the political branches [112]. These boundaries are by no means fixed and immutable; they cannot be since they express relative values. They may be viewed as a form of political and institutional physics: for every action, there is an opposite and equal reaction.

The reactive quality of this application of constitutional principles is most evident in political question and act of state cases. Judicial power can be limited through abstentions and declarations of nonjusticiability. Although reluctant to employ them, courts are unwilling to dispense with these powers [113], especially when the legislative or executive branch attempts to restrict or compromise their use. Thus, in the aftermath of the Hickenlooper Amendment, the courts preserved the act of state doctrine by construing the amendment narrowly. Sabbatino itself may exemplify judicial reassertion and extension of a doctrine as a reaction to executive branch efforts to subject the judiciary to its political position on foreign policy [114].
Disagreement about the nature of the political question doctrine has exposed at least three rationales [115], the classical, functional, and prudential approaches, which provide a useful framework for act of state questions as well. This article redefines the categories, accounting for the differences which arise in applying political question doctrine to cases that implicate both the "vertical" federal legal structure and the "horizontal" international legal structure [116]. These approaches reveal differing assumptions about the role of the judiciary in a federal system. Most importantly, identification of the approaches reveals how courts - depending upon the questions raised - manipulate doctrine to achieve certain results.

The classical approach restricts each court to a careful appraisal of its competency to resolve the dispute, both as one component of a federal system and as a domestic court in an international legal order. In contrast, the balancing tests of the functional and prudential approaches demonstrate a court's faith in its ability to balance a variety of individual, national and foreign interests.

3.2. The classical model

Domestically, in the arena reserved for political questions, the classical model presumes that courts will abstain only given “a textually demonstrable constitutional commitment of the issue to a coordinate political department” [117], as the courts interpret the constitutionally imposed boundaries of each branch [118]. Under the classical model, the burden is to show that the Constitution precludes adjudication of the issue. In act of state questions, the classical model reverses the presumption and shifts the burden without changing its underlying logic. As the cases from Underhill to Sabbatino make clear, the presumption is that courts should not adjudicate issues that implicate the acts of foreign powers [119]. Instead, they must show why these issues should be judged.

The classical model is consistent across its domestic and international versions. On domestic questions, the Constitution establishes the competence of the courts to define the roles of the coordinate branches of government; therefore the courts must articulate their constitutional reasons for deferring to another branch. A similar presumption of judicial competence in the area of international law does not exist. In fact, because there is neither an "adequate 'higher law' available to resolve serious disputes between states", nor a legal structure "effective to overcome most conflicts that arise within it" [120], the opposite is true and something more is required to demonstrate competence.

The classical act of state doctrine recognizes that international disputes often involve questions beyond the competence of the courts because these disputes force courts to evaluate the acts of foreign states and to make and implement decisions affecting these states [121]. Furthermore, when confronted
by questions not based upon "a treaty or other unambiguous agreement" [122]
or clearly defined international standard [123], courts must apply different
standards which go beyond those that "... govern the interpretive process
generally" [124] and beyond their powers to interpret a constitutional text.
Their dilemma is compounded because the constitutionally founded values,
both social and economic, that are applicable to domestic disputes are not
necessarily transferable to the international environment [125].

The classical model has, as a logical concomitant, little sympathy for the
equities involved between the parties. From the outset its goal is to preserve the
structural integrity of the domestic and international political systems, not to
provide remedies or impose sanctions [126]. This approach results in broad
immunity to private defendants who involve a foreign government in their
anticompetitive schemes and offers scant redress for plaintiffs [127].

In Hunt, for example, this immunity was soundly criticized by courts and
commentators alike [128]. The criticism, however, reflects a reordering of the
priorities found in Sabbatino. The opinion in Sabbatino quite explicitly sub-
ordinated the question of individual equities to the issue of institutional
integrity. It stressed the difficulties created when a court attempts to weigh
divergent economic and ideological national interests [129] or when it responds
on an ad hoc basis [130] to private interests or to the equities between parties
[131].

3.2.1. Classical examples

The Hunt plaintiff [132] claimed that oil producers had conspired to
preserve their competitive advantage at his expense. He contended that fellow
oil producers had persuaded him to join in a "sharing agreement" that
"guaranteed" him backup oil if he took a tough bargaining position with the
Libyan government. When the Libyan government began negotiations, Hunt
stood firm and, as a result, his oil property was nationalized [133].

Perhaps to circumvent an act of state defense, Hunt did not challenge the
validity of the Libyan nationalization [134]. He claimed that Libya's act was
induced by the unlawful conduct of the defendants [135] but failed to persuade
the court [136]. The Second Circuit held that, under the Sherman Act, Libyan
nationalization was a necessary element of the charge, since Hunt had to
establish that the injury was a direct result of the conspiracy [137]. It reasoned
that such proof was not possible unless Hunt could show that "but for" the
conspiracy "Libya would not have moved against it" [138].

The Hunt opinion invoked the act of state doctrine in the language of
Sabbatino: the doctrine "precludes the courts...from inquiring into the valid-
ity" of sovereign acts [139]. Using a classical analysis, the court concluded that
inquiry into the validity of the Libyan nationalization was best left to the
executive branch [140]. The court noted both its lack of the requisite expertise
in foreign affairs to render an appropriate decision on "an issue of far-reaching
national concern” [141] and its procedural inability to probe “the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog…” [142].

Its application of the act of state doctrine was somewhat mechanical, but Hunt expressed the correct decision. Hunt’s argument rested on his ability to show that the “sharing agreement” triggered the nationalization of his property and assumed that Libya had no other motive for its action—an assumption that the court was powerless to test. In contrast to Hunt’s claims, the governmental conduct in question was part of “a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants” [143]. It was therefore reasonable for the court to conclude that the expropriation was part of a series of political reprisals directed at the United States rather than an act meant to punish one intransigent oil producer [144]. In these circumstances, to balance U.S. interests against Libyan interests, or the interests of Hunt against those of his fellow oil producers, would have been naive and over-reaching. Such balancing would have assumed competence equal to that of the State Department, which the court declined to assert.

The court’s argument in Hunt is straightforward, yet its elegance does betray the rigid nature of the contemporary classical model and suggests why most courts have been unwilling to follow it [145]. The opinion is uncompromising in its attitude towards the equities of the private parties and the relative economic interests of the United States and Libya [146]. Its rigidity, however, may partially result from judicial pique at the frustrating disarray in the doctrine: “it is not for this inferior court to undertake the task [of defining the act of state]. This is particularly so since our holding is compelled by the separation of powers underpinning of the doctrine” [147].

Although the classical model has fallen into disfavor [148], it has retained vitality when the foreign state’s economic interests are seen to involve its strategic or natural resources [149], or when the national interests at stake are particularly sensitive [150]. In these cases, courts continue with a structured analysis directed to their competence and explain their abstentions by invoking the principles of international comity [151] or the deference required by federalism [152].

3.3. Balancing: Functional and prudential models

Sabbatino’s explanation of the act of state doctrine as a judicial extension of principles embodied in a system with separate powers [153] limits the act of state analysis to an evaluation of the institutional roles at risk. Does the federal system provide an effective and preferred method for resolving the conflict without recourse to the courts [154]? Given the precedential weight of judicial decisions, even a “just” decision acceptable to the world community may damage the relationships between the branches [155]. Would adjudication by a
domestic court, even if internally justified, threaten the growth of a world order of law? Given the impulse of domestic systems to extend legal control beyond national boundaries [156], the conflict between different ideologies [157] may sharpen unless federal courts employ self-restraint based upon a healthy respect for the independence of foreign states and a due regard for judicial autonomy [158].

The Sabbatino viewpoint of the act of state doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations" [159] and calls attention to the constraints imposed upon each branch by its specialized functions. In this light, courts should be unconcerned with the specific foreign policy issues raised [160], the policy "signals" from the political branches, or the specific injuries suffered by the claimants [161], and should focus instead on the potential for injury to the federal system, the risks to the credibility of U.S. law, and the potential for disrupting the judicial process by using it to set standards of international law [162].

This reading of Justice Harlan's language is not, however, self-evident [163]. On the contrary, courts and commentators interpret the Sabbatino opinion as the Supreme Court's endorsement of a more active role for the judiciary in disputes that involve foreign sovereigns. The opinion is seen as outlining the rudimentary principles of a balancing test that permits courts to weigh the "injury to our foreign policy against the injury to the private party, who is denied justice...", or against "a consequent injury to international trade" [164]. Such balancing alters the judicial perspective [165]. Instead of addressing the institutional issues, courts adopting a form of balancing treat the dispute as though it were a purely domestic suit controlled by domestic principles of law [166].

The result of balancing is to recast language in the Sabbatino opinion to emphasize the individual judge's competence to resolve the dispute over the competence of the judicial branch to adjudicate "foreign" issues [167]. This is because two propositions pervade balancing opinions: that if jurisdiction is present, the court should adjudicate absent a compelling reason to abstain; and that a court can resolve most disputes placed before it, even those involving the acts of a foreign state. The central problem thus becomes not whether the court should act, but how it should act; not whether it is overstepping boundaries, but whether it will be criticized for doing so [168]. As a consequence, such courts are concerned whether their judgments will be positively perceived and effectively enforced. Balancing courts resolve these issues differently.

3.3.1. The functional approach

Some judges, such as those in the Dunhill plurality, approach the problem pragmatically. By yielding to the views of the political branches, they display respect for the other branches of government. By concentrating on the nature
of the private injury and the reasonable expectations of the parties as demonstrated in the course of conduct, and by emphasizing the equitable relief available in support of a judgment, they stress their equitable powers. They limit themselves to considering whether they are sufficiently informed about the "official" U.S. position to avoid conflict with or embarrassment of the executive branch [169] or to escape contradicting legislative intent [170]; whether they have available judici ally manageable standards [171] or relevant data on the issues raised [172]; or whether the injury claimed is such that justice and fairness demand a judicial remedy [173]. In short, this approach limits the range of questions by stressing the court's ability "to manage" a case; to discover the relevant facts, treating the representations of the executive branch as "facts"; and to test the equitable interests of the litigants by characterizing them as private citizens without a colorable hint of state involvement. The result reasserts the power of the judiciary and its ability to function with procedural competence.

3.3.2. Functional example

An example is Dunhill [174], in which the petitioners claimed that the Cuban government had refused to return funds owed them [175]. The Cuban government claimed that such refusal was an act of state immune from judgment in a U.S. court. The petitioners argued that the defense should not apply because the act was purely commercial [176]. The U.S. government's amicus brief proposed that the Court go further - overrule Sabbatino and abandon the act of state doctrine or fashion a broad commercial act exception to the doctrine [177]. A majority of the Court [178] could agree only that the Cuban government had not proved it had acted in its state capacity [179]. Justice White gained only plurality support for the broader proposition that a sovereign's commercial acts constitute exceptions to the act of state doctrine [180].

Justice White, the sole dissenter in Sabbatino, had three premises in Dunhill. Each promoted a functional analysis. (1) In foreign policy matters and act of state claims, the judiciary should defer, if possible, to the expertise of the executive branch [181]. (2) Even in act of state cases, the equitable interests of private trading partners demand recognition [182]. (3) A state act is one which the state has formally ratified [183]. Each premise narrows the analysis, for the appropriateness of the claim is left largely to another branch of government, the claim is made subject to the interests represented by the parties, and the factors establishing state action are drastically reduced.

By invoking the State Department's support for a commercial act exception, Justice White aligned the judiciary with the political branches in a way the Sabbatino Court had not envisioned. For him, "the major underpinning of act of state doctrine" [184] was not the constitutional relationship between branches and the competency of dissimilar institutions [185], but "the policy of foreclosing court adjudications involving the legality of acts of foreign states on their
own soil *that might embarrass the Executive Branch of our Government* in the conduct of our foreign relations" [186]. Justice White evidently read the separation of powers language in *Sabbatino* as intended to protect the credibility of the political branches [187]. The passage may be read equally, however, as an affirmation of judicial autonomy [188].

By deciding that the principle of equity was "required" in commercial and contract disputes [189], Justice White narrowed the court's inquiry to the parties' conduct and the potential injury to U.S. foreign policy:

... The proper application ... [of the act of state doctrine] ... involves a balancing of the injury to our foreign policy ... against the injury to the private party, who is denied justice.... In the commercial area the need for merchants to have their rights determined in courts outweighs any injury to foreign policy [190].

This analysis depends upon the premise that it is unfair to bar litigation when the parties expected to do business by reasonable standards of commerce.

Justice White's reliance on equitable principles is misplaced, however, given the institutional rationale of the act of state doctrine [191]. As Justice Marshall, writing for the dissent, explained, "...the act of state doctrine exempts no one from the process of the court.... [The doctrine] merely tells a court what law to apply to a case; it 'concerns the limits for determining the validity of an otherwise applicable rule of law'" [192].

Although Justice White was unable to muster a majority of the Court for a broad commercial activity exception [234], he succeeded in creating a narrow test for determining the indicia of an "act of state": evidence of formal endorsement, whether by statute, order, or equivalent affirmative action [193]. Here the tactical advantages of the functional approach become apparent. Controversies are decided on limited grounds with close scrutiny directed to the burdens of proof. Thus, in determining whether the Cuban government had met its burden, Justice White could find neither facts on the record [194] nor a formal act by the Cuban government [195] to establish that its refusal to return the monies was a state act. Such scrutiny limits the doctrine and provides a useful tool for the denial of act of state defenses.

3.3.3. The prudential approach

It is sometimes difficult to distinguish the various forms of balancing tests used by courts. Thus, although functional and prudential balancing have been used for different purposes and to achieve different ends, they are often melded. For example, in *Timberlane* [196] the court predicated much of its analysis on prudential reasoning while finding additional functional grounds on which to reject the act of state claim: some of the acts upon which the claim was based lacked allegations of a relationship to the state [197]. In contrast, the court's prudential analysis revealed the broader questions raised by courts,
Prudential courts, in common with functional courts, appreciate the pragmatic realities of power, especially their own [198]. These courts, however, are more cautious [199], perhaps due to their uneasiness with assessing a foreign sovereign's interests. For this reason, under a prudential approach, a court is as likely to reject an act of state claim to preserve its authority as to accept a claim to keep from undermining judicial credibility [200]. Considerations of equity are less crucial to prudential judges. They begin by accepting the potential validity of foreign acts of state [201] but are not satisfied until the foreign sovereign's public interest is evaluated [202] and then weighed against U.S. interests [203]. The language of prudential opinions thus discusses broad goals of national policy [204].

The process of comparing foreign interests and U.S. interests is highly subjective and often slanted in favor of U.S. interests because U.S. courts view the significance of domestic laws and U.S. regulatory goals more favorably than foreign ones. For example, the U.S. antitrust laws may be considered more "significant" than a foreign state's interests in its own affairs. The effects test, the legacy of the Alcoa case, survives: a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends" [205]. Thus, in recent antitrust actions, the U.S. policy interests embodied in antitrust laws have been found more important than a foreign state's interest in its patent law [206], its licensing procedures [207], its judicial system [208], its state-owned enterprises [209], and its method for purchasing military equipment [210]. In balancing, U.S. antitrust interests thus overrode foreign interests except when the foreign interest was explicitly strategic [211] or the foreign state was viewed as politically significant [212].

3.3.4. Prudential example

The defendant in Timberlane [213] was accused of conspiratorial activities involving the abuse of the judicial proceedings of Honduras and bribery of a court officer [214]. The lower court dismissed the case under the act of state doctrine [215], but Judge Choy, writing for the Ninth Circuit, vacated the judgment [216].

After a careful discussion of the act of state doctrine, citing elements from the three models identified in this article, Judge Choy turned to Sabbatino's commendation of the "balance of relevant considerations" [217]. He determined that the relevant consideration was the "depth and nature" of the state's interest in the act, not merely the validity of the act [218]. The test was viewed as an inquiry into the significance of the public purpose: has the state engaged in an act in order to achieve some goal or is it merely the vehicle through which private citizens act towards private goals [219]? This analysis thus distinguishes between recognizing an act as the expression of a state [220]
and reducing a transaction to the specific facts in dispute [221].

Judge Choy concluded that the suit did not threaten "relations between Honduras and the United States" [222], and that "there is no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or trade with the United States should be restrained" [223]. These conclusions rested partially on his determination that the Honduran court was a disinterested judicial forum which had been exploited by the defendant.

Testing for state interest is deceptive, however. As one commentator observed about the Timberlane conclusion, "it seems difficult to imagine a case with more potential to offend a foreign government and to embarrass our own than an American court's declaring a foreign government's decision invalid because inadequately reasoned, inconsistent with its own law, or induced by the corruption or bribery of a foreign judge or official..." [224]. The same difficulties arise when a U.S. court attempts to measure the interest of the state in its patent system [225] or its procedures for licensing its natural resources [226]. By distinguishing between "the validity" of an act and "the interest" a state has in the act itself, Judge Choy follows the Dunhill [227] plurality's requirement of evidence of formal ratification to endow the act with sovereign purpose. This "rule" may be suspect in Dunhill, and is more so in Timberlane, where a test for formal ratification is used, by implication, to evaluate the state's interest in its judicial process.

In OPEC [228], Judge Choy clarified his views on the act of state doctrine. An American union accused the members of the Organization of the Petroleum Exporting Countries (OPEC) of violating U.S. antitrust laws by fixing oil prices [229]. The court held that the act of state doctrine supported dismissal, reasoning that the doctrine was fashioned to fit such cases [230]: to proceed would have required the federal court to apply domestic antitrust doctrine to, and judge the purpose behind, the acts of the OPEC nations [231]. According to Judge Choy, a court cannot judge the underlying purposes of a foreign state without presuming too much [232], especially when the challenged act involves a strategic national resource [233].

Few opinions present so candidly the judicial doubts and "inner vulnerability" [234] underlying the prudential approach to act of state jurisprudence. Judge Choy sees the judiciary as unable to evaluate "competing economic and political considerations" [235] because of the random fashion in which cases are presented for decision [236]. Prudential courts betray anxiety, as Professor Bickel wrote, "not so much that judicial judgment will be ignored, as that perhaps it should be but won't..." [237].

OPEC and Timberlane together demonstrate that the prudential approach "balances" interests based upon rough estimates of policy and national interests. In Timberlane, no real Honduran interest was found in the integrity of its courts. In OPEC, however, the OPEC nations' interest in their oil
appeared all but self-evident. The analysis seems conclusory. Once satisfied with the significance of the interest [238], the court in OPEC accepted the act of state claim using an explanation drawn from the classical model; a finding for the plaintiffs “would in effect amount to an order from a domestic court” to a foreign sovereign [239]. Conversely, a holding for the OPEC countries would constitute judicial endorsement of their acts and hamper the executive branch in diplomatic negotiations [240]. Here resurface the Sabbatino and Underhill principles of domestic federalism and comity [241].

While the Timberlane decision blends prudential and functional analysis, the OPEC decision combines prudential and classical analysis. Although Judge Choy himself classified the act of state doctrine as “a prudential doctrine designed to avoid judicial action in sensitive areas” [242], his opinion is hostile to arguments that “the FSIA supersedes the act of state doctrine or that the amorphous doctrine is limited by modern jurisprudence” [243]. Like Judge Mulligan in Hunt [244], Judge Choy refused to dilute or distort the doctrine with exceptions [245] or to heed the legislative messages which would undermine his judicial function [246].

3.3.5. In sum

Balancing approaches give courts an activist role in consolidating and integrating economic values through their decisions, even where international consensus is absent [247]. They place responsibility on domestic courts for harmonizing conflicting international law. In Sabbatino, Justice Harlan expressed his disapproval of such a role for the courts:

[W]e find respondents' ... arguments quite unpersuasive ... that United States courts could make a significant contribution to the growth of international law.... [G]iven the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations is, to say the least, highly conjectural [248].

Balancing approaches lead to equally unfortunate results, including a highly subjective body of case law and an ad hoc evolution of policy that is dependent on standards developed specifically for each case and is responsive primarily to the interests of the parties in dispute [249].

4. Conclusion

This article has examined how U.S. courts, since Sabbatino, have treated the act of state doctrine. A doctrine that once seemed all but definitive is now tortured by twists of judicial logic and seems highly subjective in its application. Courts have become less interested in the allocation of judicial respon-
sibility in the domestic and international settings and more engrossed in the
tactics of maintaining judicial credibility once they enter areas previously
reserved for international law or executive branch diplomacy.

In the process, the meaning of deference has been altered. Originally a
judicial judgment that a dispute could best be handled by another branch of
government [250], the term now justifies obedience to preliminary signals from
the political branches. As a result, an admixture of judicial passivity and
activism is apparent. Courts are “mere errand boy[s]” [251] for the executive
and legislative branches yet concurrently adjudicate cases involving foreign
states and economic interests which would have called for abstention under the
classical act of state doctrine.

The judiciary has thus undertaken difficult questions of definition: when
has a foreign state demonstrated a recognizable interest in the outcome of the
litigation [252]? Should a plaintiff with a just claim be barred because he was
injured by a state or individual who claims protection under the act of state
doctrine [253]? Should the state receive protection when it has acted as a
private entrepreneur engaged in commercial transactions [254]? In a word
economy, how far should one nation’s sanctions reach [255]? Can a domestic
court behave disinterestedly when applying domestic law to international
questions [256]? Are there sufficient restraints on its judgments [257]?

The danger of judicial activism is most evident in antitrust cases where
courts assert free market economic values to the disadvantage of nations with
managed or Third World economies. Courts generalize from U.S. antitrust
theory, rendering balancing tests disingenuous since the values are arrived at
through economic assumptions developed to regulate the U.S. market [258].
U.S. courts are equally ill-prepared to evaluate the interests of foreign states as
manifested through unfamiliar procedures and institutions. The economic and
political expansionism inherent in this judicial activism is no less imperial than
similar behavior from the political branches of government. Such judicial
activism also circumvents bilateral or multilateral negotiation and disrupts the
international system of treaties and agreements [259].

The effect of this new activist emphasis on the act of state doctrine can be
more readily described than explained. Perhaps the courts are unwilling “to
decline the exercise of jurisdiction which is given” [260]. Perhaps the change
reflects an uneasy consensus within the three branches that U.S. laws are too
easily manipulated by private and state entrepreneurs who find safe harbor
through act of state immunity [261]. The impulse towards equitable resolution
of unprotected interests may explain one pressure on the doctrine: a society
based on laws may be unwilling to concede the notion that its domestic courts
cannot satisfy such appeals to justice. The result, however, alters the relation-
ship of the branches and damages the development of international principles
acceptable to widely different ideological and economic systems.

Courts should return to the principles articulated in Sabbatino. They should
recognize the proper purpose of the act of state doctrine: to shield the judiciary from legislative and executive pressures intended to usurp judicial autonomy. Courts should remain sensitive to their dual roles as domestic courts maintaining the integrity of a federal system of government and as courts within one nation interacting with an international legal system. For this reason, disputes which can or should be resolved by other branches should not be adjudicated; nor should cases be judged when unambiguous international legal principles are lacking.

The need for the act of state doctrine remains compelling. Even given jurisdiction, courts must continue to ask the central question of justiciability essential to institutional integrity: whether ends more nearly constitutional will be served by not acting.
Notes

[1] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803). Judicial review is, of course, exercised by the judicial systems of other nations, but “what is ... interesting about the American experience is that judicial review was not conferred upon courts by the express language of the Constitution; it was a judge-made convention”. D.P. Kommers, Judicial Politics in West Germany – A Study of the Federal Constitutional Court 28 (1976); see also L. Tribe, American Constitutional Law 20–56 (1978) [hereinafter cited as Tribe, Constitutional Law]; D.C.M. Yardley, Introduction to British Constitutional Law 51 (1969); Haimbaugh, Was it France’s Marbury v. Madison? 35 Ohio St. L.J. 910, 918 (1974).

The uniqueness of the American attribute of self-definition is made apparent by the distinction between “centralized” and “decentralized” systems of judicial review. See generally M. Cappelletti, Judicial Review in the Contemporary World 43–68 (1971). In the former, the constitution grants and restricts the power of judicial review to a constitutional court. Id. at 46. Examples include the Federal Republic of Germany, see Grundgesetz (GG) arts. 93, 100 (W. Ger. 1949, amended 1969); Italy, see Constituzione arts. 134–137 (Ita. 1948); and Austria, see Constitution art. 140 (Aus. 1929; amended 1974). Decentralized systems of judicial review grant such authority to all the judicial organs of a legal system. See Cappelletti at 46. Examples include such common law countries as Canada, Australia and, of course, the United States. The scope of judicial review in Canada and Australia is similar to that in the United States, but its exercise in actual practice has remained narrow. See Giraudo, Judicial Review and Comparative Politics: An Explanation for the Extensiveness of American Judicial Review Offered From the Perspective of Comparative Government, 6 Hastings Const. L.Q. 1137, 1140–48 (1979); see also McWhinney, Constitutional Review in Canada and the Commonwealth Countries, 35 Ohio St. L.J. 900 (1974).

[2] See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (“We do not believe that this doctrine [of act of state] is compelled either by the inherent nature of sovereign authority ... or by some principle of international law,” id. at 421. “The doctrine ... expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals.... Whatever considerations are thought to predominate; it is plain that the problems involved are uniquely federal in nature.” id. at 423-24); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 715 (1976) (Powell, J., concurring); id. at 725 (Marshall, J., dissenting, joined by Brennan, Stewart, and Blackmun, J.J.); International Association of Machinists and Aerospace Workers (IAM) v. The Organization of the Petroleum Exporting Countries (OPEC), 649 F. 2d 1354, 1359 (9th Cir. 1981), aff’g on other grounds, 477 F. Supp. 553 (C.D. Cal. 1979), cert. denied, 454 U.S. 1163 (1982) (“The act of state doctrine is a domestic legal principle arising from the peculiar role of American courts.”).

[3] See, e.g., Dunhill, 425 U.S. at 697 (White, J., writing majority opinion, joined in this part by Burger, C.J., Powell, and Rehnquist, J.J.); Sabbatino, 376 U.S. at 401; Underhill v. Hernandez, 168 U.S. 250, 252 (1897); Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co., 658 F. 2d 903, 908 (2d Cir. 1981) (U.S. government affirmed that no foreign policy damage would occur if validity of a Cuban expropriation was adjudicated; in Supreme Court, majority rejected application of Bernstein Exception which would have Court accede to recommendations of Executive Branch); Mannington Mills, Inc. v. Congoleum Corp., 595 F. 2d 1287, 1292 (3d Cir. 1979); OPEC, 649 F. 2d at 1358-59; Hunt v. Mobil Oil Corporation, 550 F. 2d 68, 72-73 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

[4] See, e.g., Dunhill, 425 U.S. at 682 (Cuban government refused to return funds petitioners had paid to expropriated Cuban cigar companies); Sabbatino, 376 U.S. at 398 (Cuba’s central bank sued for monies due on a sugar contract) (see text accompanying notes 35–38 infra)); OPEC,
649 F. 2d at 1354 (antitrust suit alleging that OPEC and the individual nations comprising the organization fixed oil prices); MOL, Inc. v. The Peoples Republic of Bangladesh, 572 F. Supp. 79 (D. Ore. 1983) (Bangladesh was sued for damages caused by the revocation of a license to capture and export rhesus monkeys); Allied Bank Internacional v. Banco Creditor Agricola de Cartago, 566 F. Supp. 1440 (S.D.N.Y. 1983) (action to accelerate promissory notes and recover balance of payments, directed against three banks wholly owned by the Costa Rican government); Asociacion de Reclamantes v. The United Mexican States, 561 F. Supp. 1190 (D.D.C. 1983) (claim for taking and conversion of land by Mexico); Frolova v. Union of Soviet Socialist Republics, 558 F. Supp. 358 (N.D. Ill, 1983) (action brought due to U.S.S.R.'s denial of permission to plaintiff to emigrate to the United States).


[7] See, e.g., Hunt, 550 F. 2d at 72; but see Mannington Mills, 595 F. 2d at 1287 (antitrust suit alleging that defendant had misrepresented facts while procuring foreign patents through the British patent office as part of a scheme to monopolize).

[8] See, e.g., Timberlane Lumber Co. v. Bank of America, 549 F. 2d 597, 606 (9th cir. 1976) (conspiracy allegedly involved abuse of Honduran legal proceedings) (judicial hearing and decision did not constitute acts of the state); Hunt, 550 F. 2d at 68 (although defendants were private oil producers, court examined acts of Libya). But cf. Mannington Mills, 595 F. 2d at 1287 (act of state defense fails since state patent procedure allegedly used to further monopoly scheme was ministerial).


[10] Sabbatino, 376 U.S. at 423; accord Dunhill, 425 U.S. at 697 (plurality opinion).


[18] The Sage court noted that act of state analysis now requires that both domestic and foreign interests be weighed before barring the action. Sage, 534 F. Supp. at 903-94 (summarizing Timberlane, 549 F. 2d 597, Manning Mills, 595 F. 2d 1287, and subsequent cases). Although the court in Timberlane developed its list of factors to resolve questions of jurisdiction, the list has been used directly on act of state claims:

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted [footnotes omitted].

Timberlane, 549 F. 2d at 614. The court in Manning Mills refined this list:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the dependency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If relief is granted, whether a party will be placed in the position of being forced to perform and act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue [footnote omitted].

595 F. 2d at 1297-298.

See also, e.g., Note, Judicial Balancing, supra note 11 at 329-41. Compare the Manning Mills considerations with the bar to judgment of state acts and purpose in Underhill, 168 U.S. at 252; accord Dunhill, 425 U.S. at 706 (plurality) (citing Sabbatino, 376 U.S. at 401); Hunt, 550 F. 2d at 73.

[19] See Note, Judicial Balancing, supra note 11 at 357.


[22] See supra note 18.
[27] See, e.g., Tribe, Constitutional law, supra note 1, at 20–52 (“Whatever the extent to which Congress, the Executive Branch, and the states may participate in the process of constitutional interpretation, it is clear that the federal courts, through the power of constitutional review, possess a power to govern – to regulate other actors – that they would not possess if the federal judicial business consisted of nothing but statutory interpretation and interstitial common lawmaking,” id. at 33). See also OPEC, 649 F. 2d at 1360.
[28] See Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 Colum. L. Rev. 805, 822 (1964); L. Henkin Foreign Affairs and the Constitution, 60 (1972) (“the Court [in Sabbatino] went to lengths to seek novel constitutional doctrine and reestablish Act of State not as national policy promulgated by the Executive but as law created by the federal courts on their own authority.”). See generally Note, Judicial Balancing, supra note 11, at 348–51. See also infra note 114 and accompanying text.
[29] The Dunhill Court faced the act of state question, but Justice White, the sole dissenter in *Sabbatino*, was only able to persuade a plurality of the court to restrict the scope of the Sabbatino opinion.
[31] Hunt, supra note 3.
[33] Timberlane, supra note 8.
[34] OPEC, supra note 2.
[37] 307 F. 2d 845 (2nd Cir. 1962).
[38] 376 U.S. at 428.
[39] But see Judicial Balancing, supra note 11, at 341–42 (suggesting that comity and separation of power rationales are closely related because due deference to comity reinforces the power of the executive branch and restrains the judiciary from intervening in foreign relations).
[40] 376 U.S. at 423.
[41] Citibank, 406 U.S. at 765.
[42] This position is known as the Bernstein Exception, arising from *Bernstein v. N. K. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954) (per curial), in which the Court of Appeals reversed an earlier decision upon being told by the State Department that

[the policy of the Executive, with respect to claims asserted in the United States for the restitution of ... property ... lost through force, coercion, or duress as a result of Nazi persecution ..., is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.}

The Bernstein Exception has had a fitful judicial history. In Sabbatino, Justice Harlan stated that the Exception had never been accepted by the Court, 376 U.S. at 420. Despite the plurality’s approval in Citibank, six justices in concurrences and dissents rejected the Exception, 406 U.S. at 773 (Douglas, J., concurring); id. at 773 (Powell, J., concurring); id. at 790–92 (Brennan, J., dissenting, joined by Stewart, Marshall, and Blackmun, J.J.). However, in Dunhill, again in a plurality opinion and in the context of a recommendation from the State Department, Justice White suggested that the State Department’s views should be accorded some weight. See 425 U.S. at 696–70 (plurality). But see id. at 724–25 (Marshall, J., dissenting, joined by Brennan, Stewart, and Blackmun, J.J.) (reasserting the Citibank rejection of the Bernstein Exception). See infra text accompanying notes 79–86, discussing executive branch pressures on the judiciary.

[47] 168 U.S. 250, 252 (1897) (U.S. citizen claimed that he had been unlawfully detained by a foreign military commander).
[48] 246 U.S. 297, 303 (1918) (claim for restitution of hides seized by the Mexican military and later sold to a U.S. dealer).
[49] Id. at 302.
[50] 246 U.S. 304, 309 (1918) (seeking recovery of lead bullion seized by the Mexican military and later sold) (decided on the same day as Oetjen).
[51] 376 U.S. at 423.
[52] Id. at 427–28.
[53] But see, e.g., Note, Political Question, supra note 30, at 725–32 (citing each case for a specific proposition to demonstrate that the underpinnings of the doctrine have evolved from sovereignty principles to separation of powers).
[55] See Citibank, 406 U.S. at 762. See also Timberlane, 549 F. 2d at 615 n. 34; Sage, 534 F. Supp. at 898, 899.
[56] See American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.") See also Sage, 534 F. Supp. at 900.
[58] Id. at 428 (emphasis added).
[59] See, e.g., Mannington Mills, 959 F. 2d at 1292–94; Investment Development Corp. (IID), 594 F. 2d at 55; Timberlane, 549 F. 2d at 606; Sage, 534 F. Supp. at 899; Atwood & Brewster, American Business Abroad, supra note 45, at 240–41, 246–49. See also infra text accompanying notes 153–249.
[61] Id. at 433–35.
[62] Id.
[63] Id. at 431–33; see OPEC, 649 F. 2d at 1358 ("The courts, in contrast to the political branches focus on single disputes and make decisions on the basis of legal principles.").
The act of state doctrine

[65] Id. at 434–35.


[67] See, e.g., OPEC, 649 F. 2d at 1359; Sage, 534 F. Supp. at 905–06.

[68] See 425 U.S. at 695–716 (Part III of opinion, White, J., joined by Burger, C.J., and Rehnquist, J.). Justice Powell, concurring, restated his position in Citibank, see 406 U.S. at 775–76. that it remained "the duty of the judiciary to decide for itself whether deference to the political branches ... requires abstention", Dunhill, 425 U.S. at 715.


[70] Id. at 696–98.

[71] Id. at 697–98.

[72] Id. at 705. See also Leigh Letter, id. at 709. The position of the Dunhill plurality was consistent with its position in Citibank, 406 U.S. at 768 (Rehnquist, J., joined by Burger, C.J., and White, J.), which, by accepting the Bernstein Exception agreed that the judiciary should be guided by the executive branch when an act of state claim was raised). See supra note 42.


[74] This position is known as restrictive sovereign immunity because it limits the freedom from suit which sovereign governments traditionally received.

[75] See, e.g., Sage, 534 F. Supp. at 906–97; Outboard Marine, 461 F. Supp. at 398. But see OPEC, 649 F. 2d at 1359–60 (act of state is to be distinguished from the jurisdictional questions raised by, and answered by, the FSIA).

[76] See, e.g., Note, Political Question, supra note 30, at 731–32, discussing the Citibank Court's use of the Bernstein Exception.

[77] See, e.g., Note, Judicial Balancing, supra note 11, at 351–53.

[78] Id. at 352.

[79] See supra note 42 and accompanying text.


[81] Reprinted in Bernstein, 210 F. 2d at 376.

[82] 406 U.S. at 759. See also 425 U.S. at 724–25 (Marshall, J., dissenting" ... six members of the Court in [Citibank] ... disapproved finally of the so-called Bernstein exception to the act of state doctrine...").


[84] Id.


...[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking ... by an act of that state in violation of the principles of international law, including the principles of compensation....
[95] Id. §1602.
[96] Id. §1605(a)(2). See also §1603(d) (A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct of particular transaction or act, rather than by reference to its purpose).
[99] See, e.g., Empresa Cubana, 652 F. 2d at 238-39, n. 11 (2d Cir. 1981); OPEC, 649 F. 2d at 1359; Hunt, 550 F. 2d at 77-78; Allied Bank International, 566 F. Supp. at 1443.
[100] See, e.g., H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 20 n. 1 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 6619 n. 1 ("The Committee has found it unnecessary to address the act of state doctrine in this legislation. Our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine.").
[101] OPEC, 649 F. 2d at 1359.
[103] See Hunt, 550 F. 2d at 77-79.
[104] See OPEC, 649 F. 2d at 1357 n. 6.
[105] See, e.g., Dunhill, 425 U.S. at 727 (Marshall, J., dissenting); Citibank, 406 U.S. at 788 (Brennan, J., dissenting); OPEC, 649 F. 2d at 1358-59; Sage, 534 F. Supp. at 906 n. 19 and accompanying text. See also Tribe, Constitutional Law, supra note 1, at 71-79, 76 n. 35; C. Wright, Law of Federal Courts 52-56 (1976); Atwood & Brewster, American Business Abroad, supra note 45, at § 8.08 (2d ed. pocket part 1981); Note, The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments, 91 Yale L.J. 765, 783 n. 75 (1982). But see Note, Political Question, supra note 30, at 730, 740, 742-43 (contending that the political question doctrine and the act of state doctrine are distinct since the political question doctrine is constitutionally mandated while application of the act of state doctrine is discretionary).

[107] Cf. Sabbatino, 376 U.S. at 423-24 (“The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state. The act of state doctrine does, however, have ‘constitutional’ underpinnings”) and Baker v. Carr, 369 U.S. 186. 217 (1962) (“... questions arise [which] may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department...”).


[110] See supra note 107, comparing Sabbatino with Baker.

[111] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (it is the “duty of the judicial department to say what the law is...”).


[113] See, e.g., Cohens v. Virginia, 19 U.S. 264, 404 (1821) (Marshall, C.J.) (“It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should... . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.”)


Perhaps the Court [in Sabbatino] was reluctant even to appear to be abdicating judicial functions and accepting political direction from the executive branch. Perhaps it feared that basing Act of State on the authority of the Executive would also subject the courts to ad hoc determinations in the decision of particular cases which would make the courts appear as the handmaiden of the State Department.

[115] See Tribe, Constitutional Law, supra note 1, at 71 n. 1. Tribe identifies the three approaches as classical, referring to Wechsler, Neutral Principles, supra note 106, and to Weston, Political Questions, supra note 106; as prudential, referring to Bickel, Dangerous Branch, supra note 106, and to Finkelstein, Judicial Self-Limitation, supra note 106; and as functional, referring to Scharpf, Judicial Review, supra note 106.


[118] See Wechsler, Neutral Principles, supra note 106, at 9 (“[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. ...[W]hat is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally.”).

[119] See Sabbatino, 376 U.S. at 401 (the act of state doctrine “precludes the courts of this country from inquiring into the validity of the public acts a recognized power committed within its own territory”). See also Note, Judicial Balancing, supra note 11, at 353 (arguing for the
presumption that courts should not adjudicate issues with foreign policy implications without political branch permission).


[121] Sabbatino, 376 U.S. at 423.

[122] Id. at 428.

[123] Id. at 430.


[125] Sabbatino, 376 U.S. at 435.

[126] Id. at 432–33, 435. See also OPEC, 649 F. 2d at 1358. Compare this lack of concern for private interests with the active concern for the interests of injured, private parties in Dunhill, see infra text accompanying notes 174–195.


[129] 376 U.S. at 430.

[130] Id. at 435–36.

[131] Id. at 432.


[133] Id. at 70–72.

[134] Id. at 75–77.

[135] Id. at 76, 68. Cf. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F. 2d 1261 (9th Cir.)(per curiam), cert. denied, 409 U.S. 950 (1972) (holding that the act of state defense applied in a similar case) [hereinafter cited as Buttes Gas].

[136] 550 F. 2d at 72.

[137] Id. at 76.

[138] Id.

[139] Sabbatino, 376 U.S. at 401, cited by Hunt, 550 F. 2d at 73. See also Hunt, 550 F. 2d at 77. The Hunt court quoted Sabbatino through Dunhill, suggesting that the Dunhill plurality court had "reaffirmed the doctrine in traditional terms...". Id. at 72–73.

[140] Id. at 77–78 and 78 n. 12.

[141] Id. at 77. See also id. at 78 n. 13.

[142] Id. at 77.

[143] Id. at 78.

[144] Id. at 78 n. 14.

[145] See, e.g., Williams, 694 F. 2d at 304 n. 5; IID, 461 F. Supp. at 397. See also Atwood & Brewster, American Business Abroad, supra note 45, at 244–46; Note, Sherman Act Jurisdiction, supra note 128, at 1247; Note, Antitrust Conspiracies, supra note 128, at 495.

[146] But see Hunt, 550 F. 2d at 81 (dissent) ("Where ... the wrong complained of is the role played rather than the possible political reaction thereto, I think it wrong to predicate an act of state defense upon the face of the pleadings.").

[147] Id. at 79.


[149] See generally, id. at 339–40; see, e.g., OPEC, 649 F. 2d 1354 (oil); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F. 2d 1196 (5th Cir. 1978); cert. denied, 442 U.S. 928 (1979) (oil); Asociacion de Reclamantes, 561 F. Supp. at 1190 (land); MOL, 572 F. Supp. at 79 (native animals); Buttes Gas, 331 F. Supp. at 92 (oil).

See, e.g., Hunt, 550 F. 2d at 72, 73, 78; Occidental, 331 F. Supp. at 110; MOL, 572 F. Supp. at 85; DeRoburt, 548 F. Supp. at 1374.

See generally Falk, Domestic Courts, supra note 12, at 21–52. See, e.g., Hunt, 550 F. 2d at 79; Asociación de Reclamantes, 561 F. Supp. at 1198 n. 15, 1200; MOL, 572 F. Supp. at 86; DeRoburt, 548 F. Supp. at 1375.

376 U.S. at 423. Id. at 432. 376 U.S. at 429. Id. at 432–36. Id. at 423.

Id. at 428 (by considering only those disputes for which there are “agreed principle[s]”, courts avoid “the sensitive task of establishing a principle not inconsistent with the national interest or with international justice”). Id. at 434–35 (it is unlikely that “... the decisions of the courts of the world’s major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies”). See also Dunhill, 425 U.S. at 727 n. 12 (Marshall, J., dissenting, joined by Brennan, Stewart, and Blackmun, J.J.): While Sabbatino found the act of state doctrine to reflect the “distribution of functions between the judicial and political branches of the Government,” ... it has also been suggested that a doctrine of deference based upon the absence of consensus as to controlling principles of international law allocates legal competence among nations in a manner that promotes the growth of international law [citations omitted].

Id. at 435. Dunhill, 425 U.S. at 703–06; Sage, 534 F. Supp. at 900, 907–08. But see Sabbatino, 376 U.S. at 467 (White, J., dissenting) (“the Court, notwithstanding its protestations to the contrary, has laid down an ‘inflexible and all-encompassing rule in this case’”); Atwood & Brewster, American Business Abroad, supra note 45 §8.05, at 241 (“The court may not have had in mind an ad hoc balancing process...”); Note, Judicial Balancing, supra note 11, at 334 n. 24.

Dunhill, 425 U.S. at 705–06 n. 18 (White, J., for a plurality of the Court). Commentators and courts have not been in agreement about which opinions reflect a balancing test analysis. Compare Sage, 534 F. Supp. at 900 n. 5 (in which the court noted that the Dunhill plurality emphasized the concept of balancing interests, while the dissenters treated the act of state doctrine in political question terms); with Note, Judicial Balancing, supra note 11, at 334–35 n. 25 (the commentators observed that in Dunhill, the plurality called for a strict application of the act of state doctrine with a commercial activity exception and the dissenters advocated a balancing test).

See, e.g., Dunhill, 425 U.S. at 704 (“In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on ‘national nerves’.”)

The leading case on the political question doctrine, Baker v. Carr, decided two years before Sabbatino, articulates factors for considering political question cases that range from the clearly classical to the functional and prudential:

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

369 U.S. at 217 [emphasis added]. See also supra note 107.


[170] See Outboard Marine, 461 F. Supp. at 398 and n. 28; Sage, 534 F. Supp. at 908 ("... to balance the equation of an act of state case, deference to FSIA intent and purpose must be factored in to reflect the established interests of the legislative and executive branches of our government").


[172] See Tribe, Constitutional Law, supra note 1, at 71 n. 1

[173] See, e.g., Sage, 534 F. Supp. at 911 (where defendants engaged in sham litigation to eliminate plaintiffs from the market and conspired with foreign and domestic sales agents to receive illegal kickbacks, the court observed in dicta that the act of state doctrine should not be used as "a shield made available simply because Defendant has joined foreign sovereign purchasing acts into its alleged antitrust conspiracy...").


[175] Id. at 686–87.

[176] Id. at 697 n. 12, 706–11 (State Department Letter reprinted in opinion as Appendix 1); id. at 724 (Marshall, J., dissenting).

[177] Id.

[178] In a three-part plurality opinion written by Justice White, three justices joined Part II (discussing the burden of proof required for an act of state claim) and two concurred separately. Part III (discussing the rationale for a commercial act exception) was joined by two justices with Justice Powell concurring separately. Justice Powell is cryptic: he admits that "the line between commercial and political acts of a foreign state often will be difficult to delineate", id. at 715, but concludes that he "can foresee ... [no] cases involving only the commercial acts of a foreign state" which should require judicial abstention. Id.

[179] Id. at 694–95.

[180] After Dunhill was decided, Congress enacted the Foreign Sovereign Immunities Act (FSIA), see supra notes 94–104 and accompanying text, incorporating a commercial act exception in the application of jurisdictional immunity of foreign states. The legislation does not affect the act of state doctrine, see, e.g., OPEC, 649 F. 2d at 1360 ("The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity") nor did Congress intend that it should; but see Note, Political Question, supra note 30, at 735–36. Nevertheless, some courts have suggested that the FSIA does modify the act of state doctrine by adding an exception for commercial acts, see, e.g., Allied Bank International, 566 F. Supp. at 1443 n. 2; Sage, 534 F. Supp. at 907 ("The clear trend is toward application of a commercial activity exception to the Act of State Doctrine for reasons espoused by the Dunhill plurality and to effectuate the legislative intent that the FSIA not be undermined by improper assertion of the act of state defense....")

[181] Dunhill, 425 U.S. at 696–98, 697 n. 12. See also id. at 715 (Powell, J., concurring); at 724–25 (Marshall, J., dissenting) ("Mr. Justice White quite properly does not rely specifically upon the views of the [State] Department; ... [the Court's disapproval of the Bernstein exception

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The act of state doctrine minimizes ... the significance of any letter from the Department of State... "). See generally supra notes 42, 79–84 and accompanying text.

[182] 425 U.S. at 703, 705.
[183] Id. at 695.
[184] Id. at 697.
[185] Sabbatino, 376 U.S. at 423.
[186] Dunhill, 425 U.S. at 697 (emphasis added).
[187] This view has sometimes been characterized as the "embarrassment doctrine". Singer, "Act of State Doctrine of the United Kingdom, supra note 26, at 291.
[189] 425 U.S. at 705–06 n. 18.
[190] Id. (quoting the State Department with evident approval).
[191] Id. at 726–28 (Marshall, J., dissenting).
[192] Id. at 726, quoting Sabbatino, 376 U.S. at 438.
[193] See 425 U.S. at 695. But see id. at 718 (Marshall, J., dissenting) (arguing that the doctrine required neither formal decrees nor active conduct).
[194] 425 U.S. at 694. Justice White searched the record, id. at 690, but could not find a convincing factual representation, id. at 691 n. 8.
[195] Id. at 695.
[196] 549 F. 2d at 597.
[197] See e.g., Timberlane, 549 F. 2d at 608 ("... plaintiffs here apparently complain of additional agreements and actions which are totally unrelated to the Honduran government. These separate activities would clearly be unprotected even if procurement of a Honduran act of state were one part of defendants' overall scheme"). See also United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) (defendants, having conspired to monopolize the sale of sisal, could not invoke an act of state defense because the conduct included acts performed within the United States).
[198] As Justice Jackson observed of the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953).
[199] See Bickel, Passive Virtues, supra note 106, at 46, 75 (written in reaction to the classical model described by Wechsler, Neutral Principles, supra note 105); see also Henkin, Political Question" Doctrine, supra note 106; Bickel, Dangerous Branch, supra note 106, at 172.
[201] See, e.g., OPEC, 649 F. 2d at 1360.
[202] See, e.g., Timberlane, 549 F. 2d at 607.
[203] See, e.g., Mannington Mills, 595 F. 2d at 1294 (critical question is whether "the crucial acts occurred as a result of a considered policy determination by a government to give effect to its political and public interests – matters that would have significant impact on American foreign relations"); accord Williams, 694 F. 2d at 303.
[204] See, e.g., Williams, 694 F. 2d at 304 ("The act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations"); IID, 594 F. 2d at 55 ("Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action").
[205] See United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945) [Alcoa].
[207] See IID, 594 F. 2d at 55.
[208] See Timberlane, 549 F. 2d at 608.
See Williams, 694 F. 2d at 303-04; Sage, 534 F. Supp. at 911.

See, e.g., OPEC, 649 F. 2d at 1354 (oil); Hunt, 550 F. 2d 68 (oil); Buttes Gas, 461 F. 2d at 1261 (oil).

See, e.g., OPEC, 649 F. 2d at 1354 (OPEC nations); Montreal Trading, Ltd. v. Amax Inc., 661 F. 2d 864 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982) (Canada); Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977) (Brazil). See also Note, Judicial Balancing, supra note 11, at 339-40 and accompanying notes. But see Continental Ore Co., 370 U.S. at 706 (where Canadian-based subsidiary had blocked plaintiff's access to Canadian market, act of state defense did not apply since there was no indication that the Canadian government “approved or would have approved” efforts to monopolize).

549 F. 2d at 597.

Id. at 604-05.

Id. at 601. The lower court also dismissed the action for lack of subject-matter jurisdiction.

Id. at 603, 608, 615. In assessing the jurisdictional question, Judge Choy articulated a sophisticated “jurisdictional rule of reason”, id. at 613-15, which balanced the conflicts between national and foreign interests. This balancing test closely resembles that employed by courts adopting a prudential approach to act of state questions. The “jurisdictional rule”, however, was used by the court in Timberlane to decide the jurisdictional question and not to decide the act of state question. The court treats these two questions as different questions requiring different kinds of analysis. Id. at 615 n. 34. Other courts have not seen the difference and have incorporated the Timberlane “jurisdictional rule” into their act of state analysis, see, e.g., Sage, 534 F. Supp. at 902-04.

Sabbatino, 376 U.S. at 428; accord Timberlane, 549 F. 2d at 606.

549 F. 2d at 607.

See The Restatement (Second) of Foreign Relations Law of the United States §41, Comment d (1965), quoted in Timberlane, 549 F. 2d at 607-08:

An “act of state” as the term is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory…. A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interests.

See OPEC, 649 F. 2d at 1360; see also Hunt, 550 F. 2d at 78 n. 14 and accompanying text.

See OPEC, 649 F. 2d at 1360; Hunt, 550 F. 2d at 78-79. The Foreign Sovereign Immunities Act distinguishes between analyses based on the nature of the act and analyses based on the state’s motives, 28 U.S.C. §§1602-1611, see supra notes 94-104 and accompanying text. A test based upon the transaction examines the nature of the act, the expectations of the participants, and the course of dealings. A test based upon the state’s purposes looks to the state to define the act since even commercial acts may have political and economic purposes not apparent in the act.

549 F. 2d at 608.

Id. at 608.

P. Areeda, Antitrust Law 105 (Supp. 1982).

See Mannington Mills, 595 F. 2d at 1292-94.

See IID, 594 F. 2d at 55.

See Timberlane, 549 F. 2d at 606.

649 F. 2d at 1354.

Id. at 1355-57.

Id. at 1359, 1361.
Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be but won't; finally and in sum ["in a mature democracy"], the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from.

The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits.... When the courts engage in piecemeal adjudication of the legality of the sovereign acts of state, they risk disruption of our country's international diplomacy.

See also Sage, 534 F. Supp. at 900 ("However it is understood in theoretical terms, a practical application of the doctrine requires a balancing process which will lead to some variance in results depending on how the subjective factors are weighted.") See generally, Note, Judicial Balancing, supra note 11, at 339–41.

L. Sabatino, 376 U.S. at 432. See also Falk, Domestic Courts, supra note 12, at 8–9 ("Deference ... is a way of getting the controversy out of the courts and into the foreign office"). [251] See supra note 86 and accompanying text.
[252] Compare Hunt, 550 F. 2d at 78 (the act of state doctrine applied because the antitrust claim required consideration of Libya's motivation in a nationalization) with Timberlane, 549 F. 2d at 608 (the act of state doctrine did not apply because the involvement of the Honduran courts indicated no active state interest).

[253] See Dunhill, 425 U.S. at 705 n. 18 (proposing that national interests be weighed against "that injury to the private party, who is denied justice through judicial deference to a raw assertion of sovereignty ...."); Sabbatino, 376 U.S. at 435 ("It is contended that ... it is the function of the courts to justly decide individual disputes before them ... [b]ut it is difficult to regard the claim of the original owner, who otherwise may be recompensed through diplomatic channels, as ... [being superior to] the innocent third party purchaser, who, if the property is taken from him, is without any remedy.")


[255] See generally Falk, Domestic Courts, supra note 12; see also Sabbatino, 376 U.S. at 430; OPEC, 649 F. 2d at 1361.

This question is made clearly raised in the extraterritorial application of U.S. antitrust laws. In Alcoa, 148 F. 2d at 443, Judge Hand cautioned that "[a]lmost any limitation of the supply of goods in Europe, for example, ... may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress did not intend the Act to cover them." Accord Continental Ore Co. v. Union Carbide, 370 U.S. 690, 705 (1962); see Falk, Domestic Courts, supra note 12, at 37.


[257] Id. at 432, 434.


Neil J. Kleinman is vice president for academic affairs, Stockton State College, New Jersey, and is the former Senior Articles Editor of this journal. He is a graduate of the University of Pennsylvania Law School (J.D. 1984) and also graduated from the University of California, Santa Barbara (B.A. 1959) and the University of Connecticut (M.A. 1960; Ph.D. 1965).

Before entering law school, Mr. Kleinman was Dean of the College of Liberal Arts at the University of Baltimore. He has also been Professor of English at the University of Illinois and the University of Baltimore, and served as Executive Assistant to the President at the College of Staten Island, City University of New York. His publications include a book on German propaganda, The Dream That Was No More a Dream (Harper & Row 1970); and articles on the press, film, contemporary and Renaissance theater, architecture and design.