

CONSTITUTIONAL LAW — POLITICAL QUESTION DOCTRINE —  
NINTH CIRCUIT HOLDS THAT WHETHER THE PRESIDENT MAY  
CONCLUDE A TREATY WITH HONG KONG DOES NOT  
CONSTITUTE A POLITICAL QUESTION. — *Wang v. Masaitis*, 416  
F.3d 992 (9th Cir. 2005).

The political question doctrine mandates that the political branches, rather than the courts, determine the constitutionality of certain courses of action. Since the doctrine requires courts to recognize the President's discretion over many aspects of foreign affairs, judicial treatment of the doctrine is often intertwined with issues of sovereignty. However, courts have been woefully unclear about the meaning of the term "sovereignty" and have, as a result, imprecisely applied the political question doctrine in foreign affairs cases involving determinations of sovereignty. Recently, in *Wang v. Masaitis*,<sup>1</sup> the Ninth Circuit held that whether the President could conclude a treaty with a nonsovereign — in this case, Hong Kong — did not constitute a political question, and, on the merits, the court held such a treaty constitutional.<sup>2</sup> In its political question analysis, the court relied on the deceptively ambiguous term "nonsovereign" to assume an antecedent, executive determination of Hong Kong's status vis-à-vis the United States. By subjecting the President's decision to conclude a treaty with Hong Kong to judicial review, the court appropriated a portion of the foreign affairs discretion that the Constitution commits to the President.

In 1997, the United Kingdom returned control of Hong Kong to China, which adopted a "one country, two systems" policy to govern the territory.<sup>3</sup> In anticipation of the transfer, China promulgated the Basic Law, which serves as Hong Kong's constitutional document.<sup>4</sup> Prior to the transfer, a treaty between the United States and the United Kingdom governed extradition relations between the United States and Hong Kong.<sup>5</sup> In 1997, the United States and Hong Kong, with China's consent, concluded an extradition agreement, which the Senate ratified as a treaty by the requisite two-thirds vote.<sup>6</sup>

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<sup>1</sup> 416 F.3d 992 (9th Cir. 2005).

<sup>2</sup> *Id.* at 999.

<sup>3</sup> *Id.* at 994.

<sup>4</sup> See *Wang v. Masaitis*, 316 F. Supp. 2d 891, 894 (C.D. Cal. 2004). The Basic Law provides: "The Hong Kong Special Administrative Region may on its own, using the name 'Hong Kong, China', maintain and develop relations and conclude and implement agreements with foreign states . . . in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields." XIANGGANG JI BEN FA Art. 151.

<sup>5</sup> See *Wang*, 416 F.3d at 994.

<sup>6</sup> See *Wang*, 316 F. Supp. 2d at 894–95.

In 2003, a Hong Kong magistrate issued a warrant for the arrest of Michael Wang, and, after a formal extradition request by Hong Kong, a U.S. magistrate judge issued an order certifying Wang's extraditability.<sup>7</sup> The magistrate judge found that probable cause supported the charges against Wang and that the extradition agreement was constitutional.<sup>8</sup> Wang sought habeas relief, contesting both findings,<sup>9</sup> but the district court adopted the magistrate judge's report and recommendation denying habeas corpus.<sup>10</sup> The court found that the extradition agreement was a constitutional treaty, reasoning that the Constitution does not define the term "treaty" and that every prior federal court evaluating the agreement had found it constitutional.<sup>11</sup> The court also found probable cause supporting the charges against Wang.<sup>12</sup>

The Ninth Circuit affirmed. Writing for the panel, Judge Hawkins<sup>13</sup> held that, under the Constitution's Treaty Clause,<sup>14</sup> the United States may conclude a treaty with a nonsovereign entity.<sup>15</sup> Before reaching the merits, the court found that the issue did not implicate the political question doctrine and was therefore justiciable.<sup>16</sup> Judge Hawkins explained that although discerning an entity's sovereignty is clearly a political question, courts may interpret the legal impact of an antecedent executive determination of sovereignty.<sup>17</sup> To determine whether the constitutionality of the treaty was a justiciable question, the court applied the *Baker v. Carr*<sup>18</sup> test, as distilled into three factors in Justice Powell's concurrence in *Goldwater v. Carter*.<sup>19</sup> First, the court found no textually demonstrable commitment of the issue to a coordinate branch, arguing that the Constitution is silent regarding

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<sup>7</sup> See *Wang*, 416 F.3d at 993–94.

<sup>8</sup> See *Wang*, 316 F. Supp. 2d at 893.

<sup>9</sup> *Wang*, 416 F.3d at 994.

<sup>10</sup> *Wang*, 316 F. Supp. 2d at 892, 899–900.

<sup>11</sup> *Id.* at 897 (citing *Cheung v. United States*, 213 F.3d 82, 88–95 (2d Cir. 2000); *In re Extradition of Coe*, 261 F. Supp. 2d 1203, 1211 (C.D. Cal. 2003); and *United States v. Sai-Wah*, 270 F. Supp. 2d 748, 749–50 (W.D.N.C. 2003), as upholding the extradition agreement).

<sup>12</sup> *Id.* at 898–99.

<sup>13</sup> Judge Noonan joined in the opinion.

<sup>14</sup> U.S. CONST. art. 2, § 2, cl. 2.

<sup>15</sup> *Wang*, 416 F.3d at 993. The majority generally used the term "nonsovereign" but suggested that its reasoning was valid whether Hong Kong's lack of sovereignty was complete or only partial. See *id.* at 998 ("[P]re-1871 decisions did refer to Indian nations as non-sovereign, or at least less than fully sovereign."). It thus seems reasonable to read "nonsovereign" as meaning "anything less than fully sovereign."

<sup>16</sup> See *id.* at 994–96.

<sup>17</sup> *Id.* at 995.

<sup>18</sup> 369 U.S. 186, 217 (1962).

<sup>19</sup> 444 U.S. 996 (1979). The *Baker-Goldwater* test comprises the following three factors: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Id.* at 998 (Powell, J., concurring in the judgment).

treatymaking with nonsovereigns.<sup>20</sup> Second, the court determined that analogy to the Indian treaty cases provided judicially manageable standards.<sup>21</sup> Third, the court concluded that adjudication on the merits would not compromise the nation's ability to speak with one voice in the field of foreign affairs because, even if the court were to invalidate the treaty, the President could accomplish the same ends through an executive agreement or legislation.<sup>22</sup>

Moving to the merits, Judge Hawkins noted that the text of the Constitution is silent regarding the definition of "treaty" and that existing treaties receive a presumption of constitutionality.<sup>23</sup> The court then reasoned that the Framers could not have intended to limit treatymaking to sovereign entities, because nonsovereign entities were not prevalent in 1787 and thus the Framers would not have contemplated such a distinction.<sup>24</sup> The court also found that the Supreme Court's recognition of treaties between the United States and Indian nations suggested that the Treaty Clause authorizes treaties with nonsovereign entities.<sup>25</sup> As a result, the court concluded that the United States may enter into a treaty with a nonsovereign such as Hong Kong.<sup>26</sup>

Judge Ferguson dissented, arguing that the determination of valid treaty partners is a nonjusticiable political question inextricably linked with the President's broad foreign affairs discretion.<sup>27</sup> The dissent concluded that this discretion, which includes the power to make treaties, appoint ambassadors, and recognize foreign governments, constitutes a textually demonstrable commitment to the Executive of the power to determine valid treaty partners.<sup>28</sup> The dissent further reasoned that there were no judicially manageable standards in *Wang* because courts lack competence in the field of foreign relations and because the Constitution contains no identifiable textual limits on

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<sup>20</sup> *Wang*, 416 F.3d at 996.

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.* at 996–97.

<sup>24</sup> *Id.* at 997.

<sup>25</sup> *Id.* at 997–98. Wang argued that 25 U.S.C. § 71, passed in 1871 and stating that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty," implies that only sovereigns can conclude treaties. *See id.* at 998 & n.8 (quoting 25 U.S.C. § 71 (2000)). Judge Hawkins responded that the statute has no bearing on the constitutional meaning of the word "treaty" and that pre-1871 decisions, which recognized the Indian treaties, referred to the Indian nations as nonsovereign or less than fully sovereign. *See id.* at 998–99.

<sup>26</sup> *See id.* at 999.

<sup>27</sup> *See id.* at 1001–02 (Ferguson, J., dissenting).

<sup>28</sup> *See id.* at 1002. The dissent analogized to cases holding that whether a treaty survives when one country becomes part of another, *see Terlinden v. Ames*, 184 U.S. 270 (1902), and whether the President may unilaterally terminate a treaty, *see Goldwater v. Carter*, 444 U.S. 996 (1979), are political questions. *See Wang*, 416 F.3d at 1003 (Ferguson, J., dissenting).

potential treaty partners.<sup>29</sup> Judge Ferguson then responded to the majority's analogy to the Indian cases, arguing that it is unclear whether the Indian nations were sovereign or nonsovereign and that, regardless, the Indian nations were a unique circumstance.<sup>30</sup> Finally, the dissent maintained that adjudication on the merits would risk the nation's ability to speak with one voice in the field of foreign relations and would express a lack of respect for the President's foreign policy.<sup>31</sup>

The *Wang* dissent correctly concluded that the determination of valid treaty partners constitutes a nonjusticiable political question, but it failed to challenge the fundamental flaw underlying the majority's reasoning: its reliance on the ambiguous label "nonsovereign." The court used this label, despite its ambiguity, to conclude that the Executive's recognition of a single Chinese state determined Hong Kong's status and capacity vis-à-vis the United States. Furthermore, the majority was able to construe narrowly the textual grants of power to the Executive only by framing the case as posing a new and distinct issue: whether the President may sign a treaty with a nonsovereign. Similarly, it was able to analogize to federal Indian law only because of the false tidiness of this "nonsovereign" label.<sup>32</sup> By predicating executive discretion on judicial review of essentially contestable categories — sovereign and nonsovereign — and by ignoring the possibility of relevant differences among nonsovereigns, the court appropriated presidential power to interpret the Constitution in an area in which the Executive is constitutionally entitled to exercise discretion.

The majority made clear that its authority to reach the merits resulted from an antecedent determination of sovereignty:

While recognition of foreign governments . . . strongly defies judicial treatment . . . and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, *once sovereignty over an area is politically determined and declared*, courts may examine the re-

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<sup>29</sup> See *Wang*, 416 F.3d at 1004 (Ferguson, J., dissenting) (noting that "[t]he power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it" (alteration in original) (quoting *Holmes v. Jennison*, 39 U.S. 540, 569 (1840)) (internal quotation marks omitted)).

<sup>30</sup> See *id.* ("The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831))). See generally Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005) (providing a detailed account of the "exceptional" nature of federal Indian law).

<sup>31</sup> See *Wang*, 416 F.3d at 1005 (Ferguson, J., dissenting).

<sup>32</sup> The majority's treatment of the third *Baker-Goldwater* factor — prudential considerations — did not rest on the categorization of Hong Kong as nonsovereign. This point, however, does not weaken the criticism regarding the first two prongs, as commentators have noted the subjectivity inherent in the third prong. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 333 (2002) ("[T]here is no principled basis for distinguishing the cases that are avoided on prudential grounds from those that are decided.").

sulting status and decide independently whether a statute applies to that area.<sup>33</sup>

The court then stated that Hong Kong's nonsovereign status was a corollary of the Executive's recognition of China's sovereignty over Hong Kong.<sup>34</sup> Judge Ferguson did not directly challenge the majority's claim that the President had determined the sovereignty of Hong Kong, instead writing: "[T]he President . . . considered Hong Kong a foreign power — sovereign or non-sovereign — with which the United States could cooperate and reach various agreements."<sup>35</sup> The dissent suggested that the issue was separate from the question of Hong Kong's sovereignty, and thus the dissent failed to undercut the majority's assumption regarding the territory's sovereignty.

The court's assumption that an executive determination of China's sovereignty necessarily and definitively determined Hong Kong's status constituted an appropriation of interpretive power from the Executive because the term "sovereignty" is itself inherently ambiguous. The academic literature reflects widespread confusion regarding the meaning of the term, with some scholars even arguing that the concept cannot be defined.<sup>36</sup> Indeed, some scholars consider sovereignty to be an "essentially contestable concept" — a philosophical term of art meaning that the concept is normative, intrinsically complex, and a-criterial.<sup>37</sup> An essentially contestable concept is one that "not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create dis-

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<sup>33</sup> *Wang*, 416 F.3d at 995 (omissions in original) (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 212 (1962)). The majority's treatment of this statement by the *Baker* Court is misleading. The *Baker* Court was summarizing the political question doctrine in a case not involving foreign relations, finding support for judicial power to apply the law to an entity in light of its politically determined status in two cases involving clear-cut questions of sovereignty. See *Baker*, 369 U.S. at 212 & n.37. In *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948), the Court found that the Fair Labor Standards Act did not apply on the land in question, refusing to second-guess the political branches' determination that the land belonged to Great Britain rather than the United States. *Id.* at 380–81. In *De Lima v. Bidwell*, 182 U.S. 1 (1901), the Court held that Puerto Rico was not a "foreign country" within the meaning of U.S. tariff laws. *Id.* at 200. Both cases involved reliance on a determination of sovereignty in the most basic, colloquial sense for the purpose of applying statutes, with the Executive, not the Court, determining the status and capacity of the areas in question.

<sup>34</sup> See *Wang*, 416 F.3d at 995.

<sup>35</sup> *Id.* at 1002 (Ferguson, J., dissenting).

<sup>36</sup> See, e.g., Dan Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICH. J. INT'L L. 1107, 1110 (2004) ("The concept of sovereignty being inherently unstable and in a constant state of having its core criteria subject to contestation and change has the consequence that there is no single, or indeed authoritative, definition that can be given to the concept.")

<sup>37</sup> See Samantha Besson, *Sovereignty in Conflict*, EUR. INTEGRATION ONLINE PAPERS, Sept. 23, 2004, at 7, <http://eiop.or.at/eiop/pdf/2004-015.pdf>.

agreement . . . over what the concept is itself.”<sup>38</sup> While some believe that only one entity can be sovereign over a given area,<sup>39</sup> others argue that sovereignty can be divided among governing entities.<sup>40</sup> Moreover, the concept of sovereignty may be evolving along with changes in the international sphere.<sup>41</sup> Given the contested and perhaps even normative nature of sovereignty,<sup>42</sup> the majority should not have concluded that the President’s recognition of a single Chinese state determined Hong Kong’s sovereignty status.

Furthermore, Supreme Court precedent clearly reflects the view that the Constitution grants the President broad power to determine the capacity of foreign entities to interact with the United States.<sup>43</sup> The Court wrote in *Doe v. Braden*<sup>44</sup> that the President has the power to:

obtain accurate information of the political condition of the nation with which he treats; who exercises over it the powers of sovereignty, and under what limitations; and how far the party who ratifies the treaty is authorized, by its form of government, to bind the nation and persons and things within its territory and dominion, by treaty stipulations.<sup>45</sup>

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<sup>38</sup> *Id.* at 6 (emphasis omitted).

<sup>39</sup> See, e.g., MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 84 (2003) (“[S]overeignty divided is sovereignty destroyed.”); Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1631 (2002) (“Attempts to recognize two supposedly equal sovereigns governing the same subjects in the same territory will inevitably fail.”).

<sup>40</sup> See, e.g., Sarooshi, *supra* note 36, at 1110–11 (arguing that the concept of sovereignty is legitimately contested in various fora, including international organizations and states); Besson, *supra* note 37, at 4 (arguing that “rather than understanding . . . clashes of sovereignty as a problem requiring either a unitary sovereign resolution or the rejection of all sovereign resolutions, the co-existence, competition and mutual adjustment of conflicting claims of sovereignty should be regarded as a normal and desirable political and legal condition”).

<sup>41</sup> See, e.g., Neil MacCormick, *Democracy, Subsidiarity, and Citizenship in the “European Commonwealth,”* 16 L. & PHIL. 331, 338 (1997) (arguing that Europe is now “post-sovereign,” having evolved beyond sovereignty); Georg Sørensen, *Sovereignty: Change and Continuity in a Fundamental Institution*, 47 POL. STUD. (SPECIAL ISSUE) 590, 604 (1999) (“What happens is that the institution [of sovereignty] changes in order to adapt to new challenges mainly stimulated by changes in substantial statehood.”). For a detailed account of the changing role of substate actors in the international sphere, see Duncan B. Hollis, *Why State Consent Still Matters — Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT’L L. 137 (2005).

<sup>42</sup> See Besson, *supra* note 37, at 7 (“What lies behind the prima facie categorical use of central and political legal concepts like sovereignty are not facts that should be established, but conceptions and interpretations that should be evaluated and maybe amended in order to account better for the values encompassed by these concepts.”).

<sup>43</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the Executive.”); *United States v. Pink*, 315 U.S. 203, 229 (1942) (“Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.”).

<sup>44</sup> 57 U.S. (16 How.) 635 (1853).

<sup>45</sup> *Id.* at 657.

Nonetheless, the *Wang* majority restricted the Executive's discretion to the ability to determine, like an on/off switch, whether an entity is fully sovereign or less than fully sovereign, and claimed judicial power to determine the entity's treaty-making capacity in light of that antecedent determination. In so doing, the court used an inherently ambiguous label to deprive the President of the power to determine Hong Kong's treaty-making capacity without judicial approval.

The court's treatment of the first two prongs of the *Baker-Goldwater* test demonstrates the extent to which the court's reasoning relied on the "nonsovereign" label. The claim that there is no textually demonstrable commitment to the political branches seems plausible only because calling Hong Kong "nonsovereign" suggests that the President has already determined its exact status in the international sphere. Had the court framed the issue in a way that sounded analogous to an existing line of precedent, like treaty-making or recognizing foreign governments, it would have been more difficult to construe the textual grant of authority narrowly. By framing an issue seemingly distinct from these lines of precedent, the court was able to exploit the susceptibility of the first prong of the *Baker-Goldwater* test to subjective construction.<sup>46</sup>

Similarly, the majority's analogy to the Indian cases, which underpins its claim of judicially manageable standards, seems plausible only because the court described Hong Kong and the Indian tribes as nonsovereign, or partially sovereign, allowing it to group them in a single category. However, the two situations may not be analogous. The Supreme Court's deep ambivalence regarding the Indian nations' sovereignty in the nineteenth century illustrates the difficulty of comparing Hong Kong to the Indian nations.<sup>47</sup>

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<sup>46</sup> Even though the Constitution is understood to grant foreign affairs discretion to the Executive, courts can frame the category broadly, as encompassing the whole field of foreign affairs, or narrowly, as encompassing foreign affairs subject to certain constraints. See Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 455-57 (2003). This difficulty is ever-present because the political branches' discretion is never absolute. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (holding that, while discretion over treaty-making authorizes treaty provisions that might otherwise be prohibited for reasons of federalism, there are still limits on the subject matter of treaties); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (holding that, while Congress has the power to recognize Indian tribes, it may not arbitrarily call a community an Indian tribe).

<sup>47</sup> On the one hand, the Court wrote that "[the Indians'] rights to complete sovereignty . . . were necessarily diminished," *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823), and that "[t]heir relation to the United States resembles that of a ward to his guardian," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). On the other hand, the Court called the Cherokee a "state" and "a distinct political society, separated from others, capable of managing its own affairs and governing itself," *id.* at 16, and wrote: "Tributary and feudatory states . . . do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state," *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (quoting E. DE VATTEL, *THE LAW OF NATIONS* bk. I, ch. 1) (internal quotation marks omitted).

Furthermore, the conceptual tidiness created by grouping Hong Kong and the Indian nations as nonsovereign is largely illusory. A determination of partial sovereignty leaves unresolved what aspects of sovereignty, if any, Hong Kong retains and, therefore, its particular status and treatymaking capacity. The determination that the Indian nations and Hong Kong are not fully sovereign does not imply that they must inhabit the same constitutionally relevant category. The court failed to address whether differences between the Indian nations and Hong Kong might be salient to the analysis of their treatymaking capacity and therefore might warrant the recognition of subcategories within the category “less than fully sovereign.”

While neither the majority nor the dissent challenged the extradition agreement, the significance of the majority’s finding of justiciability should not be underestimated. A decision on the merits serves a legitimizing function,<sup>48</sup> whereas judicial abstention may encourage political actors to consider the constitutionality of their actions rather than defer to the judiciary.<sup>49</sup> Also, finding the issue a political question would have precluded the court from adjudicating future cases of this sort on the merits, a wise path given the judiciary’s lack of institutional competence<sup>50</sup> and accountability<sup>51</sup> in the field of foreign relations.<sup>52</sup> Yet, despite these arguments in favor of holding the constitutionality of the extradition agreement a nonjusticiable political question, the majority hid the complex foreign affairs issues at play behind the ambiguous label “nonsovereign.” In so doing, the court appropriated a portion of the power of constitutional interpretation that the Constitution commits to the Executive.

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The Court also suggested that the Indians’ treatymaking capacity may result from their unique status. *See id.* at 559 (“The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.”).

<sup>48</sup> *See* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961) (“To declare that a statute is not intolerable because it is not inconsistent with principle amounts to a significant intervention in the political process, different in degree only from a declaration of unconstitutionality.”).

<sup>49</sup> *See* Barkow, *supra* note 32, at 327–28; Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 98, 101 (1998).

<sup>50</sup> *See* Barkow, *supra* note 32, at 329; *see also* *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“[Foreign policy decisions] are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . .”).

<sup>51</sup> *See* Barkow, *supra* note 32, at 328.

<sup>52</sup> While the *Wang* court held that the President may conclude treaties with nonsovereigns, the finding of justiciability leaves open the possibility that future courts will distinguish other nonsovereigns from Hong Kong and the Indians.