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ARTICLE

THE NORMALIZATION OF FOREIGN RELATIONS LAW

Ganesh Sitaraman & Ingrid Wuerth

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THE NORMALIZATION OF FOREIGN RELATIONS LAW

Ganesh Sitaraman & Ingrid Wuerth*

The defining feature of foreign relations law is that it is distinct from domestic law. Courts have recognized that foreign affairs are political by their nature and thus unsuited to adjudication, that state and local involvement is inappropriate in foreign affairs, and that the President has the lead role in foreign policymaking. In other words, they have said that foreign relations are exceptional. But foreign relations exceptionalism — the belief that legal issues arising from foreign relations are functionally, doctrinally, and even methodologically distinct from those arising in domestic policy — was not always the prevailing view. In the early twentieth century, a revolution took place in foreign relations law. Under the intellectual leadership of Justice Sutherland, the Supreme Court adopted the idea that foreign affairs are an exceptional sphere of policymaking, separate from domestic law and best suited to exclusively federal, and primarily executive, control. The exceptionalist approach has dominated foreign relations law since that time, but it has always had questionable foundations.

Since the end of the Cold War, there has been a second revolution in foreign relations law, one whose scope and significance rival the Sutherland revolution, but one that has gone largely unrecognized. Over the last twenty-five years, the Supreme Court has increasingly rejected the idea that foreign affairs are different from domestic affairs. Instead, it has started treating foreign relations issues as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles. This “normalization” of foreign relations law has taken place in three waves. It began with the end of the Cold War and the rise of globalization in the 1990s. It continued — counterintuitively — during the war on terror, despite the strong case for exceptionalism in a time of exigency. And it has proceeded, during the Roberts Court, to undermine justiciability, federalism, and executive dominance — the very heart of exceptionalism.

This Article documents the normalization of foreign relations law over the last twenty-five years. It demonstrates how normalization can be applied to a wide variety of doctrines and debates in foreign relations law, ranging from the proper interpretation of Youngstown to the applicability of administrative law doctrines in foreign affairs to reforms in the foreign sovereign immunity and state secrets regimes. Ultimately, this Article argues that courts and scholars should embrace normalization as the new paradigm for foreign relations law.

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INTRODUCTION

The defining feature of foreign relations law is that it is distinct from domestic law. In foreign relations, the need for speed and secrecy is paramount. In foreign relations, decisions need to be uniform across the country. In foreign relations, the Executive has special expertise compared to courts and Congress. And because of its subject matter, in foreign relations, one wrong turn can lead to national calamity. As a result, courts have recognized that foreign relations is political by its nature and thus unsuited to adjudication, that state and local involvement is inappropriate, and that the President has the lead role in foreign policymaking.¹ In other words, foreign relations is exceptional.

Foreign relations exceptionalism — the belief that legal issues arising from foreign relations are functionally, doctrinally, and even methodologically distinct from those arising in domestic policy — was not always the prevailing view. In the late nineteenth century, courts and commentators treated legal issues in foreign relations just as they treated legal issues in domestic affairs: as defined by the orthodox, formalist vision of the Constitution, driven by the specific enumerated powers of the federal government and the reserved powers of the states and people. But in the early twentieth century, a revolution took place in foreign relations law. Under the intellectual leadership of Justice Sutherland, the Supreme Court adopted the idea that foreign affairs are an exceptional sphere of policymaking, distinct from domestic law and best suited to exclusively federal, and primarily executive, control.² The consequences were significant. Exceptionalism kept foreign relations conflicts out of the courts, through an expansive political question doctrine. It meant the federal government trumped state and local governments when it came to issues touching on foreign relations. And within the federal political branches, it meant that the executive branch had expansive authority and received considerable deference. Over the subsequent decades, foreign relations exceptionalism became the dominant approach to cases dealing with foreign affairs. Indeed, scholars have even pointed out that exceptionalism was so powerful in the decades after the New Deal that the study of the constitutional law of foreign relations shifted from the province of constitutional law scholars (as it had been in the nineteenth century) to that of international law scholars.³

¹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936).

² See *infra* section I.B.

³ G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 4 n.3 (1999).

Since the end of the Cold War, however, there has been a second revolution in foreign relations law. Over the last twenty-five years, in a series of decisions on the core areas of exceptionalism — justiciability, federalism, and executive power — the Supreme Court has rejected the idea that foreign affairs are different from domestic affairs. Instead, the Court has treated foreign relations issues as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles. The result is that foreign relations law is being normalized.

Although scholars have criticized certain aspects of exceptionalism and have identified particular cases of normalization, the true scope and significance of normalization has gone unrecognized. In this Article, we argue that the normalization of foreign relations law has proceeded in three waves over the last twenty-five years, and we spell out its implications for a variety of scholarly debates and legal doctrines.

We hope to make three contributions: First, we seek to document the normalization of foreign relations law over the last quarter century. In many cases, scholars and commentators have recognized when the Court has uncharacteristically treated foreign relations cases as unexceptional.⁴ But to date there has not been a comprehensive account of this trend. We believe that when viewed from the perspective of the history and the dominance of foreign relations exceptionalism, the three waves of normalization amount to a revolution — akin to, and in some ways the reverse of, the Sutherland revolution in the early twentieth century. In particular, because the normalization revolution has, surprisingly, continued in both war and peace, we believe it is not a fad, but a fundamental paradigm shift. Courts and scholars need to adapt accordingly.

We also seek to make a comprehensive case for normalization across foreign relations law. Our second aim is therefore to demonstrate the weaknesses of foreign relations exceptionalism. Foreign relations exceptionalism was an innovation of the early twentieth century, not a permanent or original part of our constitutional system. Perhaps more importantly, as an analytic matter, foreign affairs are less distinct from domestic affairs than exceptionalists believe. Scholars have explored this history and questioned the distinctness of foreign affairs in a variety of areas.⁵ We unite these criticisms and provide a theoretical defense for not treating foreign relations law as exceptional.

Our third aim is to show how normalization can radiate beyond the three core areas of foreign relations law and influence a variety of de-

⁴ See *infra* Part II.

⁵ See *infra* sections I.B, II.A.

bates in the field. We show how normalization helps clarify existing doctrines including *Youngstown*;⁶ how it applies in scholarly debates on the applicability of *Chevron*⁷ in foreign relations, the role of “soft law” forms of international cooperation, and the legal framework for international delegations; and how it suggests that foreign official immunity and state secrets law should be reformed.

The Article proceeds in three Parts. In Part I, we define foreign relations exceptionalism, describe its rise in the twentieth century, and criticize its basis and justifications. We begin by arguing that foreign relations exceptionalism is best understood as the belief that legal issues arising from foreign relations are functionally, doctrinally, and even methodologically distinct from those arising in domestic policy. Despite the dominance of foreign relations exceptionalism over the last eighty years and the frequent use of the term in the scholarly literature, it remains undertheorized. In the context of the debates on exceptionalism, we believe our definitional discussion is an independent contribution, regardless of whether one agrees with our broader normalization thesis. Part I then describes the rise of this framework in the early twentieth century and its focus on three central areas: nonjusticiability, which suggests expansive deference to the political branches; federalism, which rejects state and local participation in foreign relations; and executive dominance, which allocates power within the federal political branches to the executive.

In Part II, we describe the three waves of foreign relations normalization. The first wave of normalization took place in the 1990s. With the end of the Cold War, scholars began to challenge the prevailing exceptionalist approach. They questioned the distinction between foreign and domestic affairs in an age of globalization and sought to resurrect federalism in foreign affairs, just as it was being revived in domestic constitutional law. Unexpectedly, the Supreme Court also refrained from applying exceptionalist reasoning in a few important foreign relations cases. Still, the significance of the first wave of normalization was primarily foundational: scholars cracked the armor of foreign relations exceptionalism, identifying its relatively recent emergence, its doctrinal problems, and its analytic failures.

The second wave of normalization began, counterintuitively, with September 11 and the war on terror. With the onset of a national security crisis and ultimately two wars, many predicted a resurgence of foreign relations exceptionalism — which would have left the first wave of normalization as a historical curiosity, an outlier. Indeed, the Bush Administration seems to have expected as much, justifying many

⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

of its war-on-terror decisions with exceptionalist legal reasoning. But surprisingly, the war on terror did not lead to the full-throated return of exceptionalism. Rather, it prompted the faster, deeper, and broader normalization of foreign relations law. In *Rasul v. Bush*,⁸ *Hamdi v. Rumsfeld*,⁹ *Hamdan v. Rumsfeld*,¹⁰ and *Boumediene v. Bush*,¹¹ the Supreme Court rejected claims of nonjusticiability and expansive executive power, and instead relied on typical statutory interpretation, as would be expected in domestic law. Scholars increasingly began to explore the applicability of administrative law doctrines and principles to foreign affairs. Lawyers developed expertise and specialization in national security cases, particularly surrounding Guantanamo detainees. The significance of the second wave of normalization cannot be overstated. In the midst of wartime exigency — perhaps the optimal context for a reassertion of foreign relations exceptionalism — normalization continued to proceed apace. Importantly, as national security and foreign relations legal issues proliferated during the war on terror, lower court judges, lawyers, and scholars interacted more frequently with foreign relations issues. Frequency leads to normalcy, and foreign relations law seemed less and less exceptional.

In the last decade, the Roberts Court has ushered in a third wave of normalization. We give the Roberts Court's normalization efforts an extended treatment, as they have not yet been assessed comprehensively. The Court has increasingly jettisoned exceptionalism in each of its three central areas: justiciability, federalism, and executive dominance. In *Zivotofsky v. Clinton*¹² and *Bond v. United States*¹³ (*Bond I*), cases on the political question doctrine and standing, respectively, the Court rejected the exceptionalist approach and declared the issues in those cases as suitable for adjudication. In *Bond v. United States*¹⁴ (*Bond II*), *Chamber of Commerce v. Whiting*,¹⁵ and *Medellín v. Texas*,¹⁶ the Court took on the federalism prong of exceptionalism, treating state-federal relations as a matter of ordinary interpretation. And in *Medellín* and a variety of statutory interpretation cases — *Kiobel v. Royal Dutch Petroleum Co.*,¹⁷ *Morrison v. National Australia Bank Ltd.*,¹⁸ *Bond II*, and *Republic of Argentina v. NML Capital*,

⁸ 542 U.S. 466 (2004).

⁹ 542 U.S. 507 (2004).

¹⁰ 548 U.S. 557 (2006).

¹¹ 553 U.S. 723 (2008).

¹² 132 S. Ct. 1421 (2012).

¹³ 131 S. Ct. 2355 (2011).

¹⁴ 134 S. Ct. 2077 (2014).

¹⁵ 131 S. Ct. 1968 (2011).

¹⁶ 552 U.S. 491 (2008).

¹⁷ 133 S. Ct. 1659 (2013).

¹⁸ 561 U.S. 247 (2010).

*Ltd.*¹⁹ — the Court refused to defer to the executive branch, challenging the principle of executive dominance. Although the full significance of the third wave of normalization will not be clear without historical distance, the Court increasingly seems to be treating separation of powers and statutory interpretation questions similarly in the foreign and domestic contexts. Scholars, too, have embraced this trend, documenting normalization in particular fields and exploring themes that cut across foreign and domestic spheres, as if there were little relevant distinction. Exceptionalism continues to wane.

This changing nature of U.S. foreign relations law raises an obvious normative question: should exceptionalism be preserved or rejected? In Part III, we argue that analyzing foreign relations law as ordinary law is not so threatening. In fact, the considerations that are often cited to support exceptionalism — flexibility, speed, secrecy, the nature of the subject matter, error costs, and the like — all operate at far too high a level of generality. The foreign versus domestic divide is hardly justifiable on its own terms as narrowly tailored to these underlying values, and exceptionalism is both over- and under-inclusive as a proxy for these underlying functional values. Indeed, foreign affairs law generally raises the same competing concerns that emerge in ordinary domestic law and that are addressed through separation of powers, federalism, and administrative law. The weak justifications for exceptionalism provide no reason to fear treating foreign affairs as akin to domestic affairs. The burden, we argue, should shift to those who prefer exceptionalism, those who prefer normalization along the exceptionalist baseline, or those who prefer convergence — all of which depart from the familiar domestic baseline of separation of powers, federalism, and administrative law.

The normalization of foreign relations law is ongoing, not complete, and in Part IV we show how normalization could be extended to other important areas and debates in foreign relations law. First, we argue that the Supreme Court should eliminate stray remarks and exceptionalist arguments in its decisions on justiciability, federalism, and executive power. After the normalization cases of the last few decades, these outlier references are unnecessary and inappropriate. Second, we argue for normalizing *Youngstown*, possibly the most famous case on the separation of powers. By distinguishing clearly between a predicate statutory interpretation question and the constitutional law question, courts can normalize both. The result will be greater use of ordinary statutory interpretation and ordinary constitutional interpretation in cases raising executive power concerns. Third, in recent years scholars have engaged in a debate on the appropriate

¹⁹ 134 S. Ct. 2250 (2014).

level of deference to the executive branch in foreign relations cases. This debate has turned in part on the applicability of *Chevron* deference, with some prominent scholars calling for *Chevron* to apply even more broadly in the foreign relations context than in the domestic. This position conflicts with normalization, and we instead argue for the normal application of administrative law doctrines set forth in *Chevron*, *Skidmore*,²⁰ *Seminole Rock*,²¹ and *State Farm*.²² We also argue that normal interpretive principles should apply in the context of deference to the executive's factual determinations and interpretation of treaties. In recent years, the Supreme Court has issued decisions suggesting conflicting approaches to these questions. We show how normalization would address this confusion, in part through the adoption of the *Skidmore* and *State Farm* standards. Fourth, scholars have recently been concerned with the delegation of power to international organizations. We argue that international delegation should be seen as similar to normal domestic delegation, and that it will not lead to the worrying conclusions some scholars have identified. Finally, we take on the issues of foreign official immunity and the state secrets privilege. We argue that thinking of these fields as susceptible to administrative action, requiring congressional delegation of rulemaking authority or the equivalent, could readily solve ongoing debates. These areas represent (at least some of) the unfinished business of normalization. A brief conclusion follows.

Before turning to Part I, a few clarifications are in order. First, we are not arguing that normalization is complete. Indeed, our efforts to extend normalization to areas in which it has not been adopted would themselves undermine such a broad or universal claim. Our argument is more limited and precise, and it has descriptive, predictive, and normative components. Descriptively, we argue that normalization is and has been at work, slowly but surely, over the past twenty-five years. Because these stirrings of normalization cut to the heart of foreign relations exceptionalism and have continued in war and peace, we believe they are revolutionary in their significance. We therefore suspect and predict that they are likely to be expanded to other areas of foreign relations law. Normatively, we argue that the courts and scholars should embrace the normalization trend, and we show how they can do so.

Second, we do not seek here to explain *why* normalization is taking place. We have a number of hypotheses: the perception of reduced risk of negative foreign affairs consequences after the Cold War, schol-

²⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

²¹ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

²² *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

arly attacks on exceptionalist doctrine, the rise of the conservative legal movement, the Bush Administration's overreaching legal arguments coupled with shocking uses of executive power, and the widespread acceptance of *Chevron*. But these hypotheses are simply that; a thorough account of the reasons for why normalization has taken root must be left to another day.

Finally, we do not claim to be the first to challenge foreign relations exceptionalism as a theoretical matter, or the first to suggest that cases and doctrines are being normalized. Indeed, we gratefully recognize the many scholars who have identified normalization in their particular fields. These scholars have, however, failed to describe the full scope of normalization. The trend has taken place over a twenty-five year period. It has touched many areas of law. It has continued in war and peace. It has changed the very core of foreign relations law. As a result of this transformation, we should no longer view foreign relations as exceptional, with outlier cases that are "normal." We should now *expect* "normal" treatment of foreign relations issues — and characterize the remaining instances of exceptionalism as outliers. Normalization is the new normal.

I. THE RISE OF FOREIGN RELATIONS EXCEPTIONALISM

A. *Defining Foreign Relations Exceptionalism*

While scholars have discussed foreign relations exceptionalism for more than a decade, the meaning of the term itself remains undertheorized, making it difficult to evaluate the practice. The term was coined by Professor Curtis Bradley, who defined foreign relations exceptionalism generally as the practice of "distinguish[ing] sharply between domestic and foreign affairs."²³ The simplicity of this definition obscures the diversity of ways in which the term has been interpreted and applied. Some of the differences in application are based on attempts to create subcategories of exceptionalism. Thus, some scholars have suggested there are stronger and milder versions of

²³ Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998) [hereinafter Bradley, *Treaty Power*]; see also Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51 (1999) [hereinafter Bradley, *Dualist Constitution*] (defining foreign affairs exceptionalism as "the view that the usual constitutional restraints on the federal government's exercise of power do not apply in the area of foreign affairs"); Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999) [hereinafter Bradley, *New American*] ("[Foreign affairs exceptionalism] is the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers."). Terminology varies a bit. See, e.g., Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 (2002) (using "foreign affairs differential"). We use the terms "foreign relations" and "foreign affairs" interchangeably.

exceptionalism;²⁴ others have argued there are national security exceptionalists and internationalist exceptionalists.²⁵ Conflict also persists with regard to consistency. Some claim that exceptionalists have been inconsistent in their exceptionalism;²⁶ others claim that non-exceptionalists have been inconsistent in their non-exceptionalism.²⁷

Putting aside the obvious boundary problem in defining “foreign,”²⁸ the central analytic problem with the common definition of exceptionalism is that it does not distinguish between those differences that emerge from standard analysis, such as constitutional text and original history (which we call “formalist”), and those differences that are based instead on distinctive functional, doctrinal, or methodological analysis.²⁹ Scholars sometimes criticize exceptionalism on both formalist and functional grounds;³⁰ and other times, they distinguish between formal and functional grounds.³¹ We therefore define foreign

²⁴ See, e.g., Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 140–41 (2001) [hereinafter Young, *Dual Federalism*]; see also *id.* at 176 n.245 (noting different definitions of exceptionalism).

²⁵ See, e.g., Michael D. Ramsey, *Textbook Revisionism*, 43 VA. J. INT’L L. 1111, 1117 (2003) (book review).

²⁶ See, e.g., Bradley, *Dualist Constitution*, *supra* note 23, at 555.

²⁷ See, e.g., Jean Galbraith, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. 121, 123 (2014), <http://www.texaslrev.com/treaty-termination-as-foreign-affairs-exceptionalism-response-to-curtis-bradley-treaty-termination-and-historical-gloss> [<http://perma.cc/12JJ9-ERTG>].

²⁸ Indeed, we note in Part III that “foreign” and “domestic” are not so clear anymore, rendering exceptionalism more difficult. For this reason, we largely bracket the question of what exactly fits into *foreign relations* exceptionalism. We mean to include national security law, foreign affairs law, and immigration law, though each of these areas is contested as to its scope and to the degree it covers “foreign” or “domestic” topics, particularly along the edges.

²⁹ Compare Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1583 (2003) [hereinafter Bradley, *International Delegations*] (“The case for foreign affairs exceptionalism is primarily a functional one — grounded, for example, in concerns about the need for flexibility in addressing foreign affairs problems and the desirability of speaking with ‘one voice’ in interacting with the international community.”), and Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. (forthcoming 2015) (suggesting a link between functionalist and exceptionalist reasoning), with Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 533 (2000) (defining exceptionalism as “the view that the Constitution resolves disputes as to the allocation of authority over foreign relations in a manner distinct from that used to resolve such disputes on a domestic level” and arguing that “constitutional text, structure, history, and precedent all indicate that the framers themselves were ‘foreign affairs exceptionalists,’ and modern developments have only highlighted the wisdom of their approach”), and Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 560 (2012) (arguing that an instrumentalist-based decision rule that distinguishes between domestic and foreign relations cases is not true foreign affairs exceptionalism because courts are not “interpret[ing] the Constitution differently in foreign-affairs cases than they do in domestic cases”).

³⁰ See, e.g., Bradley, *International Delegations*, *supra* note 29, at 1583–86 (criticizing *Curtiss-Wright*’s exceptionalism on both textual and functional grounds).

³¹ See Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713, 720 (2002) (“The Constitution in some respects explicitly addresses matters of foreign affairs dif-

relations exceptionalism to mean that domestic and foreign affairs-related issues are analyzed in distinct ways as a matter of function, doctrine, or methodology. Excluded from this definition are distinctions between foreign and domestic powers that result from generally applicable formalist analysis based on, for example, constitutional text and original history. The President is the Commander in Chief, a power that has particular significance in foreign relations. The treaty-making process is different from the process of passing legislation. This is not exceptionalism.

We exclude these kinds of distinctions because we think they fail to isolate what the term “foreign relations exceptionalism” attempts to measure. The purpose of the term is not just to state that foreign and domestic affairs are legally distinct in particular ways, but also to evaluate whether those differences are appropriate. The term itself sets a baseline of generally applicable analysis (that is why foreign affairs can be “exceptional”) and seeks to identify places where the analysis of foreign affairs diverges from this baseline. If generally applicable analysis of text and original history allocates foreign affairs powers in particular ways, that allocation is still at the baseline.³² Assuming an exclusively domestic affairs baseline when evaluating text and original history would embed an objection to foreign affairs divergences from the start. This would make it very difficult to evaluate the appropriateness of treating foreign affairs differently because it conflates debates about the text and original history with debates about functional, doctrinal, or methodological concerns. The claim that the federal government must speak with “one voice,” for example, is based on both constitutional text, which is not exceptionalism, and the unique needs of the federal government as co-equal sovereign in relation to other countries, which is exceptionalism. We are concerned with untangling these arguments and focusing on the latter. Doing so is particularly important because, as we describe in Part III, many of these

ferently from domestic matters. For example, it establishes a different method for making treaties than for making statutes. But, where it does not, there would appear to be little justification for resolving legal issues under wholly different standards just because they touch upon foreign affairs.”); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91, 140 (2009) (noting that internationalists root treaty exceptionalism in the Supremacy Clause); see also Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs,* 70 U. COLO. L. REV. 1277, 1306–07 (1999) (arguing that text can justify *Missouri v. Holland*).

³² Generally applicable analysis includes stare decisis — so long as it is applied the same way in domestic and foreign affairs cases. *Contra* Michael P. Van Alstine, *Stare Decisis and Foreign Affairs,* 61 DUKE L.J. 941, 943 (2012) (“Stare decisis and the law of foreign affairs seem to inhabit entirely different jurisprudential worlds with no apparent means of communication.”). Stare decisis is itself deeply contested. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication,* 88 COLUM. L. REV. 723, 742 (1988).

functional arguments cannot be justified, yet they have been embraced at times by the Court and by an important body of scholarship.³³

Functional arguments can lead to exceptionalism in doctrine and methodology. Sometimes exceptionalism appears with the application of facially neutral doctrine in distinctive ways in foreign relations cases.³⁴ The political question doctrine, for example, is framed in neutral terms but has been applied to bar many foreign relations claims because those claims are said to pose unique risks. The doctrine itself is not exceptionalist, but the claim that the doctrine should be differently applied in foreign relations is. The purportedly distinctive functional features of foreign relations can also lead to differences in methodology. Some have argued, for example, that historical practice may play an especially important role in foreign relations because it is a form of deference to the political branches, which reflects “limitations on the judiciary’s expertise and access to information, limitations that are thought to be especially acute in the area of foreign affairs.”³⁵ Of course, historical practice can play an important role in domestic constitutional interpretation, too.³⁶ But when the functional foreign relations arguments are used to justify *greater* reliance on historical practice in a foreign affairs case, as opposed to a domestic affairs case, that is exceptionalism in action.

In attempting to isolate (and ultimately criticize, in Part III) functional, doctrinal, and methodological exceptionalism, we do not mean to argue that there are *never* any differences between the foreign and domestic realms. There obviously are. Our point is that any particular functional analysis needs to be justified at a lower level of generality and considered as it would be in domestic affairs. For example, federal common law is sometimes justified based on the presence of “uniquely federal interests,”³⁷ that render the preemption of state law “necessary.”³⁸ Therefore to determine whether federal common law

³³ See *infra* sections III.B–C; see also Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT’L L. 507, 509 (2011); Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (2014); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153; Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007).

³⁴ Exceptionalism does not include facially neutral doctrine that has a particular impact in foreign relations. Legislative standing doctrine, for example, bars the judicial resolution of many foreign relations cases. See *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997). This doctrine thus shapes the field of foreign relations in important ways, but is not exceptionalist.

³⁵ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 429 (2012).

³⁶ See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

³⁷ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)) (internal quotation marks omitted).

³⁸ *Id.*

governs a particular aspect of foreign relations, such as the act of state doctrine or immunity, courts must consider whether uniformity is important. This analysis might include foreign affairs–related considerations such as the possibility of strife with other countries or the impact on the development of customary international law. But note that domestic affairs might also push courts to consider the import of uniformity. As a result, we do not believe that uniformity considerations merit the expansive doctrines that accompany foreign affairs exceptionalism, but they may be relevant and appropriate when considered in a narrow, non-exceptionalist analysis.

One objection to our definition is that it is impossible to disentangle formalist arguments from exceptionalism; that is, exceptionalism creeps into interpretations of the text and original history. We think this proves too much. If exceptionalism means simply the different treatment of foreign and domestic issues, even when there is a clear textual commitment on point (for example, treaties and legislation following different paths toward passage), then exceptionalism loses much of its usefulness. With respect to statutes, it is possible that Congress delegates more power to the President in foreign than domestic affairs — perhaps, in other words, Congress has internalized arguments for exceptionalism. Assuming that this is true (though we are not convinced it is), it does not necessarily follow that courts should interpret congressional delegations of power differently in the foreign and the domestic context. Of course, in both statutory and constitutional interpretation, non-exceptionalist reasoning by the courts will sometimes mean that the executive branch has more or different kinds of power in foreign relations than in domestic cases. Again, this is not exceptionalism.

Relatedly, we acknowledge that foreign relations exceptionalism can be overt or covert. Overt exceptionalism exists when courts decide cases on exceptionalist grounds — and say as much. But courts may also decide foreign relations cases differently from domestic ones without acknowledging that they are doing so.³⁹ While one can advocate for the elimination of exceptionalism, it is possible that exceptionalism will just shift into the shadows. To some extent, this is a problem, because exceptionalism could persist without being identified. But as with scholars who have tried to evaluate whether judges are politi-

³⁹ See, e.g., Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1106–31 (2009) (describing “black holes” and “grey holes” — domains in which the executive is either explicitly or implicitly exempt from legal constraints — in national security law cases); see also Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1287 (2001) (“Contrary to the Court’s suggestion in *Crosby*, however, the Court’s approach to preemption in that case was far from ordinary.”).

cal,⁴⁰ it is possible to look at the outcomes of cases to determine if, in the aggregate, outcomes align with what foreign relations exceptionalism would predict. Moreover, if exceptionalist judges shift from overt to covert exceptionalism, that itself might be significant because it would at least remove exceptionalist arguments from legal doctrine and argument.

Finally, it is worth noting that exceptionalism can take place at the constitutional and statutory level. Exceptionalism operates in the separation of powers realm if, for example, the President's powers are interpreted differently in foreign affairs than domestic affairs, contra generally applicable interpretive practice or specific functional justification at a low level of generality. Normalization can also apply in the same way to executive branch decisionmaking.⁴¹ After all, the State and Defense Departments are agencies akin to more familiar domestic agencies like the Environmental Protection Agency or Department of Transportation. Indeed, one of normalization's features is shifting analysis in foreign relations from exceptional constitutional law to ordinary administrative law and statutory interpretation arguments.

B. *The Sutherland Revolution in Foreign Relations Law*

Foreign relations exceptionalism was not always the norm. In the nineteenth century, foreign relations law was not seen as distinct from ordinary domestic law. Rather, foreign relations issues were generally addressed "in accordance with a traditional, formal structure of constitutionally delegated and reserved powers."⁴² As scholars have shown, this "orthodox" approach — although not without exceptions that began to develop in the late nineteenth century⁴³ — had important implications for three critical areas in foreign relations law: justiciability, executive power, and federalism.

The foundational assumption of the orthodox approach was that courts would treat foreign relations disputes in accordance with the traditional constitutional limitations of enumerated federal powers and

⁴⁰ See generally, e.g., CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?* (2006).

⁴¹ We bracket the argument that the President should be treated as a "normal" actor, on par with other agencies. For a discussion, see, for example, Kevin M. Stack, *The President's Statutory Powers to Administer the Law*, 106 COLUM. L. REV. 263, 309 (2006) [hereinafter Stack, *President's Statutory Powers*]; Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 575–584 (2005) [hereinafter Stack, *Statutory President*]; see also Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703 (2007) (arguing that the President does not have a non-statutory power over how executive officials who have been statutorily delegated authority implement laws).

⁴² White, *supra* note 3, at 3.

⁴³ See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (limiting states' ability to restrict immigration).

reserved powers to the states and people.⁴⁴ As a result, under the orthodox approach, the political question doctrine was severely circumscribed.⁴⁵ Although nineteenth-century courts did recognize some political questions, such as the recognition of new governments and the annexation of territory,⁴⁶ the Court would not generally use the political question doctrine as a mechanism for avoiding complex or challenging cases. Thus, when Professor Westel Willoughby wrote his treatise on constitutional law in 1910, he could state clearly that “[w]hen, however, private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.”⁴⁷ Throughout the late eighteenth and nineteenth centuries, the Court decided a wide array of foreign relations cases, applying the law of prize, federal statutes, treaties, and the Constitution, with little suggestion that these kinds of cases posed unique risks or called for exceptional treatment.⁴⁸

With respect to executive power, the general view in the late nineteenth century was that the President had no independent lawmaking authority. International agreements could be concluded through ordinary lawmaking (for example, by Congress adopting tariffs via its foreign commerce power) or through the treaty process with the advice and consent of the Senate — both as specified in the Constitution.⁴⁹ Prize cases and issues of foreign sovereign immunity were resolved by the courts; the executive branch neither dictated the result nor created the law that courts were bound to follow. While nineteenth-century courts would regularly grant deference to the executive on the question of whether a foreign government was sovereign, they would “decide the immunity issue as they would any other issue of common law, bas-

⁴⁴ White, *supra* note 3, at 8–9.

⁴⁵ *Id.* at 26.

⁴⁶ *Id.*; see also Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1135 (1999) (arguing that some aspects of Sutherland’s theory had roots in the Court’s early nineteenth-century decisions according Congress broad power “relating to Indians, aliens, and territories”).

⁴⁷ 2 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1009 (1910).

⁴⁸ See, e.g., *The Paquete Habana*, 189 U.S. 453 (1903); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). See also Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 YALE L.J. 855, 861 (2005) (concluding based on extensive empirical analysis that “in the Jay and Marshall era the day-to-day business of the Court was foreign affairs”).

⁴⁹ See White, *supra* note 3, at 12–13.

ing their judgments on domestic, maritime, and international law principles.⁵⁰

Finally, on the orthodox account, the allocation of foreign relations powers to the federal government did not eviscerate the power of the states; rather, the general understanding was that the exercise of foreign relations power by the federal government respected the powers of the states under the Constitution.⁵¹ Indeed, during the nineteenth century, states were frequently engaged in foreign relations issues, including extradition and retaliation against foreign countries for unfair business practices.⁵² States were also involved in setting immigration policies; it was not until 1875 that immigration became an issue of federal regulation.⁵³

As Professor G. Edward White has documented, in the early twentieth century the orthodox approach began to break down.⁵⁴ It was ultimately replaced by foreign relations exceptionalism. The reasons for this change are contested and likely varied: the rise of U.S. diplomatic and military power on the world stage, the emergence of totalitarian ideologies, the composition of the Supreme Court, and the political dynamics of the New Deal, among other things. The early twentieth-century transformation undoubtedly had antecedents in broader historical developments that began in the nineteenth century, such as the President's increased use of force abroad, the overall growth in U.S. economic power, and the plenary power doctrine.⁵⁵ And constitutional arguments for and against broad executive power in foreign relations date back to the eighteenth century, as the Pacificus-Helvidius debate famously illustrates.⁵⁶ Nevertheless, the Supreme Court's approach to foreign relations law unquestionably changed in the early twentieth century.

The clearest advocate, if not the central architect, of foreign relations exceptionalism was Justice George Sutherland. Prior to joining the Supreme Court in 1922, Sutherland served as a senator from Utah.

⁵⁰ *Id.* at 27–28.

⁵¹ *Id.* at 9.

⁵² *Id.* at 23–24; see also Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1211–14 (2000) (describing state laws that resulted in “acute diplomatic complications,” *id.* at 1211–12, but also arguing that state negotiation with foreign powers was understood by some as an unconstitutional violation of the “dormant treaty power,” *id.* at 1214).

⁵³ See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

⁵⁴ See generally White, *supra* note 3.

⁵⁵ See generally Cleveland, *supra* note 46; Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987 (2013) (describing the nineteenth-century growth in executive power over recognition, use of force, and international agreements).

⁵⁶ See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 14–22 (5th ed. 2014).

In lectures published in 1910 and 1919,⁵⁷ Sutherland outlined a constitutional vision for foreign relations that diverged radically from the orthodox view. At the core of Sutherland's approach was the distinction "between our internal and our external relations," that is, the distinction between the federal government's powers "which are exerted in its dealings with the several states and their people" and "with the outside world."⁵⁸ For Sutherland, the external power of government was *extraconstitutional*, deriving its scope from the nature of sovereignty itself.⁵⁹ This theory had important implications. With respect to "internal" affairs, the traditional approach to enumerated powers operated. Congress had only the specific powers granted to it; all other powers were reserved to the states and the people. But with respect to "external" affairs, the default rule was power in the hands of the federal government, as sovereign. These powers were so broad that they were defined only by what the Constitution "fails to negative."⁶⁰

Sutherland's theory was significant for each of the three elements of the orthodox view. The extraconstitutional, or inherent, nature of foreign relations power meant that the political question doctrine was far more expansive than it had been under the orthodox approach: deference to the federal government's policies was mandatory.⁶¹ Sutherland's position resolved an important issue of executive power as well. Early in the twentieth century, presidents began to issue "protocols": executive agreements that did not have Senate consent or ratification.⁶² Sutherland's theory legitimized these agreements. Because the power to make agreements was not "negative[d]" by the Constitution, it was inherent in the "external" powers of the federal government.⁶³ Finally, Sutherland's exceptionalism transformed federalism. Because the federal government held exclusive authority over "exter-

⁵⁷ GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919) [hereinafter SUTHERLAND, CONSTITUTIONAL POWER]; George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1910) [hereinafter Sutherland, *Internal and External*].

⁵⁸ Sutherland, *Internal and External*, *supra* note 57, at 374 (emphases omitted).

⁵⁹ *See id.* at 384; White, *supra* note 3, at 53.

⁶⁰ SUTHERLAND, CONSTITUTIONAL POWER, *supra* note 57, at 47.

⁶¹ White, *supra* note 3, at 60-62.

⁶² Examples include the Boxer Protocol and protocols with China and Japan between 1905 and 1917. *See id.* at 20.

⁶³ *Id.* at 59 (quoting SUTHERLAND, CONSTITUTIONAL POWER, *supra* note 57, at 47); *see also* David L. Sloss et al., *Continuity and Change over Two Centuries, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT* 589, 591-592 (David L. Sloss et al. eds., 2011) (describing the early twentieth-century growth in executive power over foreign relations).

nal" powers, federal power should trump state interests when foreign affairs were at stake.⁶⁴

Once appointed to the Court, Sutherland implemented his theory in a series of cases that provided the foundation for foreign affairs exceptionalism. The most important case, *United States v. Curtiss-Wright Export Corp.*,⁶⁵ came in 1936. At issue was the delegation doctrine: whether a joint resolution could condition a prohibition on selling arms and munitions during a conflict between Bolivia and Paraguay on a presidential proclamation finding that arms sales would be detrimental to peace. Although the delegation probably would have been unconstitutional in a domestic case,⁶⁶ the Court nonetheless upheld it based on the internal/external distinction developed by Justice Sutherland decades before.

Justice Sutherland's opinion in *Curtiss-Wright* also articulated a functional case for expansive deference to the President in foreign relations cases. "[T]he President alone," he wrote, "has the power to speak or listen as a representative of the nation."⁶⁷ The President knows better "the conditions which prevail in foreign countries."⁶⁸ Unlike Congress, the President has institutional resources: "agents in the form of diplomatic, consular and other officials."⁶⁹ In foreign affairs, moreover, "[s]ecrecy . . . may be highly necessary," and "embarrassment — perhaps serious embarrassment — is to be avoided."⁷⁰

A few months later, in the 1937 case of *United States v. Belmont*,⁷¹ Sutherland explored the implications of the exceptionalist framework for federalism. The Soviet government in Russia had expropriated the assets of a Russian corporation, including those in a deposit account in New York.⁷² After the expropriation, the President recognized the Soviet government and came to an agreement with a Russian minister that assigned to the United States all claims by the Soviet government against American nationals.⁷³ The question was whether the agree-

⁶⁴ Sutherland's views on federalism are particularly interesting, given that he was one of the "Four Horsemen" deeply opposed to federal power during the New Deal debates. See White, *supra* note 3, at 118.

⁶⁵ 299 U.S. 304 (1936).

⁶⁶ See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 420-30 (1935); see also Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 7-8 (1973) (explaining that based on domestic precedents the Court's decision in *Curtiss-Wright* was "shaky").

⁶⁷ *Curtiss-Wright*, 299 U.S. at 319.

⁶⁸ *Id.* at 320.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 301 U.S. 324 (1937).

⁷² *Id.* at 325-26.

⁷³ *Id.* at 326.

ment, which had not been approved by a supermajority of the Senate or otherwise passed into law, trumped New York's public policy against confiscation of property.⁷⁴

Sutherland's first argument set the tone of the opinion: "We do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved."⁷⁵ This was a radical position in comparison to the orthodoxy of the nineteenth century. In support, Sutherland relied again on his internal/external theory: "Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government."⁷⁶ That the agreement was not an Article II treaty was irrelevant; as a sole executive agreement, it had the same constitutional status and it trumped state law. The reason was simple: "[T]he external powers of the United States are to be exercised without regard to state laws or policies."⁷⁷

Sutherland's opinions amounted to a revolution in foreign relations law, but other decisions by the Court also arguably contributed to the rise of foreign relations exceptionalism. The Court's 1920 decision in *Missouri v. Holland*⁷⁸ held that the federal government has broader power acting pursuant to the Treaty Power than it does pursuant to the Commerce Clause, and arguably also held that Tenth Amendment limitations do not apply to the Treaty Power.⁷⁹ The reasoning, like Sutherland's, was premised on a sharp distinction between domestic and foreign affairs, although the extent to which the opinion was a departure from nineteenth-century views is contested.⁸⁰ Justice Holmes's

⁷⁴ *Id.* at 326–27.

⁷⁵ *Id.* at 327.

⁷⁶ *Id.* at 330; *see also id.* at 331 ("As to such purposes the State of New York does not exist.").

⁷⁷ *Id.* at 331.

⁷⁸ 252 U.S. 416 (1920).

⁷⁹ *See id.* at 432, 433–35; *see also* Reid v. Covert, 354 U.S. 1, 16–18 (1957); Bradley, *Treaty Power*, *supra* note 23, at 423–26, 459.

⁸⁰ *See* Bradley, *Treaty Power*, *supra* note 23, at 418. *Missouri v. Holland* is also consistent with the argument that the federal government has extraconstitutional powers in foreign relations. *Cf.* 1 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 5 (1902) (reasoning that the treaty-making power of the federal government "is derived not only from the powers expressly conferred by the Constitution, but . . . is also possessed by that Government as an attribute of sovereignty"). The historical foundations of *Missouri v. Holland* are contested. *Compare* Bradley, *The Treaty Power*, *supra* note 23, *with* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1100–01 (2000), *and* Michael P. van Alstine, *Treaties in the Supreme Court, 1901–1945*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT 191* (David L. Sloss et al. eds., 2011).

opinion for the Court was famously opaque, but it seemed to rest both on textual and exceptionalist grounds.⁸¹

In another development, the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*⁸² restricted the federal courts' application of common law and in doing so called into question the direct applicability of international law in federal courts. Before *Erie*, international law was routinely applied as general common law; after *Erie*, international law had (and continues to have) no clear status in federal courts. Some argue that *Erie* forecloses international law's direct application as common law;⁸³ others argue that international law survives *Erie* as federal common law preemptive of state law.⁸⁴ In either case, *Erie* called into question the direct application of international law in the U.S. legal system. And after World War I, courts rarely heard prize cases, reducing judicial engagement with legal questions related to war and international law. Although these two developments were not examples of foreign relations exceptionalism, they had the effect of marginalizing foreign relations and international law, contributing to their transformation into specialized, distinctive areas of law and perhaps also to the perception that they posed unique risks and challenges.⁸⁵

From the 1930s forward, exceptionalism dominated foreign relations law, but not on the exact foundations that Sutherland had offered. Sutherland's theory of extraconstitutional power, including his efforts to provide historical support for his theory, came under "withering criticism" as early as the 1940s.⁸⁶ The most significant exceptionalist arguments upon which *Curtiss-Wright* rested thus quickly lost their significance. Instead, the divergent treatment of foreign affairs was increasingly based on functional arguments about the exceptional nature of foreign relations, sometimes mixed with cursory analysis of constitutional text or history. Courts applied the political

⁸¹ See *Missouri*, 252 U.S. at 433 ("We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.")

⁸² 304 U.S. 64 (1938).

⁸³ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

⁸⁴ See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

⁸⁵ See Michael D. Ramsey, *Customary International Law in the U.S. Supreme Court*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 225 (David L. Sloss et al. eds., 2012) (describing the decline of international law in the work of the U.S. Supreme Court).

⁸⁶ HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990); see also David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 190 (2002) ("Sutherland's theory of inherent presidential power stems from his bizarre reading of Anglo-American legal history."); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barre or Curtiss-Wright?*, 13 YALE J. INT'L L. 5 (1988); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Lofgren, *supra* note 66; Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

question doctrine to limit the justiciability of foreign relations claims and thereby preserve the political branches' ability to shape foreign policy.⁸⁷ The act of state doctrine, applied as an "enclave" of federal common law post-*Erie*, was also said to facilitate the decisionmaking of the political branches, while preventing state intrusion into the "uniquely federal" problems involved in "ordering our relationships with other members of the international community."⁸⁸ And the Supreme Court struck down an Oregon statute that limited the inheritance rights of nonresident aliens, not on the grounds that it was preempted by a federal statute or a treaty, but instead because "foreign policy attitudes" are "of course . . . matters for the Federal Government."⁸⁹

Executive power flourished. Sole executive agreements increasingly displaced treaties.⁹⁰ With virtually no discussion, the Supreme Court held that the State Department's suggestions of foreign sovereign immunity were binding on the courts.⁹¹ Cases involving statutory and constitutional interpretation in the context of military necessity were characterized by "extreme deference" to the government.⁹² The Court's infamous decision in *Korematsu v. United States*⁹³ reasoned, for example, that "when under conditions of modern warfare our

⁸⁷ See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 14–18 (1992); cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Courts also adopted the rhetoric of deference more generally. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 368 (2000) (acknowledging that "the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court'" (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983) (omission in original))).

⁸⁸ *Sabbatino*, 376 U.S. at 424–25.

⁸⁹ *Zschernig v. Miller*, 389 U.S. 429, 437–38 (1968).

⁹⁰ See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *YALE L.J.* 140 (2009) [hereinafter Hathaway, *Presidential Power*]; Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236 (2008).

⁹¹ See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 589–90 (1943); see also Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 *VA. J. INT'L L.* 915, 931 (2011).

⁹² Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 *NW. U. L. REV.* 983, 1006 (2011); see *id.* at 1002–06 (describing *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); and *Ex parte Quirin*, 317 U.S. 1 (1942)); see also Harlan Grant Cohen, "Undead" *Wartime Cases: Stare Decisis and the Lessons of History*, 84 *TUL. L. REV.* 957 (2010). One of these cases, *Ex parte Quirin*, involved troubling and bizarre behind-the-scenes conduct by Supreme Court Justices, including a meeting between Justice Frankfurter and Secretary of War Stimson, and a memorandum containing a fictional dialogue between Justice Frankfurter and the Nazi saboteurs. See G. Edward White, *Felix Frankfurter's "Soliloquy" in Ex Parte Quirin: Nazi Sabotage & Constitutional Conundrums*, 5 *GREEN BAG* 2D 423, 433–38 (2002). Compared to these earlier cases, the military commissions cases today seem like business as usual. See Carlos M. Vázquez, "Not a Happy Precedent": *The Story of Ex Parte Quirin*, in *FEDERAL COURTS STORIES* 218, 228, 238 (Vicki C. Jackson & Judith Resnik eds., 2010).

⁹³ 323 U.S. 214 (1944).

shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”⁹⁴ Even the Due Process Clause of the Constitution was interpreted in light of “the traditional deference to executive judgment ‘[i]n this vast external realm.’”⁹⁵ The courts repeatedly asserted that the federal government, not the states, had power over foreign policymaking.⁹⁶ While there were obviously counterexamples, foreign relations exceptionalism defined foreign relations law throughout much of the twentieth century.⁹⁷

II. THE THREE WAVES OF NORMALIZATION

In this Part, we argue that foreign relations is being normalized. The normalization of foreign relations law has taken place in three general waves: after the Cold War, during the war on terror, and under the Roberts Court. We focus primarily on the third wave — partly because its components have not been identified in a comprehensive way, and partly because the first wave was led by scholars (who are obviously well-acquainted with it) and the second wave focused on topics that received considerable contemporaneous attention. Other scholars have identified elements of normalization within each wave, but the full scope and significance of normalization over the past quarter century has gone unrecognized.

There have been some exceptions to normalization, and we discuss some of them here and in Part IV. But these exceptions do not disprove the general rule. Rather, while individual cases here and there might come out in exceptional ways, with each wave over the last twenty-five years, foreign relations law has been increasingly normalized. In the aggregate, the evidence indicates a clear trend. We believe normalization has been sufficiently consistent and significant that foreign relations law needs a paradigm shift. Normalization is now ascendant.

A. *The First Wave: The End of the Cold War*

Despite widespread judicial practice and the support of leading scholars,⁹⁸ at the end of the Cold War a few scholars began to challenge the exceptionalist view. Professor White exposed its relatively recent historical roots.⁹⁹ Professor Bradley challenged exceptionalism’s

⁹⁴ *Id.* at 220.

⁹⁵ *Regan v. Wald*, 468 U.S. 222, 243 (1984) (alteration in original) (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936)).

⁹⁶ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003); *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

⁹⁷ See Bradley, *New American*, *supra* note 23, at 1090–97.

⁹⁸ See Nzelibe, *supra* note 33; Posner & Sunstein, *supra* note 33.

⁹⁹ White, *supra* note 3.

treatment of federalism, arguing that state and local governments were increasingly attempting to engage with foreign countries, that the Supreme Court had expressed an interest in reviving federalism in domestic law, and that there was growing skepticism regarding the kind of judicial lawmaking that had led to justiciability doctrines.¹⁰⁰ Other scholars challenged exceptionalism's approach to the political question doctrine and executive power.¹⁰¹ The rise of Alien Tort Statute litigation brought renewed scrutiny to the question of whether *Erie's* general rule applied to international law, or whether international law had survived *Erie* as a unique form of federal common law.¹⁰² Although the issues were different, the academic pushback against treating international and foreign relations law as exceptional was similar. Still, while scholars questioned the durability of the distinction between domestic and foreign, there was no across-the-board normative assault on exceptionalism. Some scholars (generally liberals) liked exceptionalism in the context of federalism, for example, but not when it came to executive power.¹⁰³ Others (generally conservatives) seemed to take the opposite view.¹⁰⁴

The academic criticism of exceptionalism in the late 1990s was bolstered by cases that appeared to take an increasingly formalist, less exceptionalist approach to foreign relations.¹⁰⁵ In *Japan Whaling Ass'n v. American Cetacean Society*,¹⁰⁶ the Court declined to use the political question doctrine in a statutory interpretation case not involving separation of powers issues.¹⁰⁷ In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,¹⁰⁸ the Court limited the scope of the act of state doctrine.¹⁰⁹ In *Barclays Bank PLC v. Franchise Tax Board*,¹¹⁰ the Court upheld the constitutionality of a California tax statute that required worldwide reporting for multinational firms,¹¹¹

¹⁰⁰ Bradley, *New American*, *supra* note 23, at 1097–104; *see also* Flaherty, *supra* note 31; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1670 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

¹⁰¹ *See, e.g.*, FRANCK, *supra* note 87; Cleveland, *supra* note 46.

¹⁰² *Compare* Bradley & Goldsmith, *supra* note 83, *with* Koh, *supra* note 84.

¹⁰³ *See, e.g.*, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 195 (2d ed. 1996); *see also* Bradley, *International Delegations*, *supra* note 29, at 1585–86 (noting scholars who appear to accept exceptionalism in separation of powers but not federalism).

¹⁰⁴ *See* Bradley, *Treaty Power*, *supra* note 23 (arguing against federalism-related exceptionalism, but not against foreign relations exceptionalism as a whole).

¹⁰⁵ Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999).

¹⁰⁶ 478 U.S. 221 (1986).

¹⁰⁷ *See id.* at 229–30.

¹⁰⁸ 493 U.S. 400 (1990).

¹⁰⁹ *See id.* at 409.

¹¹⁰ 512 U.S. 298 (1994).

¹¹¹ *Id.* at 302–03.

despite opposition from foreign countries¹¹² and precedent establishing “dormant preemption” in foreign relations cases.¹¹³ And while the Court in *Crosby v. National Foreign Trade Council*¹¹⁴ held that Massachusetts’ sanctions on Burma were preempted by the federal sanctions regime,¹¹⁵ some scholars immediately viewed the opinion as notable for its failure to rely on exceptionalist arguments.¹¹⁶

The significance of the first wave of normalization was primarily foundational. Scholars cracked the armor of foreign relations exceptionalism, identifying its relatively recent emergence, its doctrinal problems, and its analytic failures. The Supreme Court, for its part, dipped its toe in the waters of normalization. There was not a widespread belief — in the courts or among scholars — that foreign affairs exceptionalism was dead.¹¹⁷ But momentum was gaining.

B. *The Second Wave: The War on Terror*

Then came the terrorist attacks of September 11th. After 9/11, scholars predicted that the courts would respond in exceptionalist terms: with broad doctrines of nonjusticiability and deference to the executive.¹¹⁸ When its policies were challenged in court, the govern-

¹¹² See *id.* at 324 n.22 (1994) (“The governments of many of our trading partners have expressed their strong disapproval of California’s method of taxation.”).

¹¹³ See *id.* at 310. Commentators recognized the importance of the case. See, e.g., Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 212 (“Many believe that *Barclay’s Bank* marks the end of all dormant foreign affairs preemption doctrines.”).

¹¹⁴ 530 U.S. 363 (2000).

¹¹⁵ *Id.* at 366.

¹¹⁶ See Goldsmith, *supra* note 113, at 178; Spiro, *supra* note 23, at 695. Scholars disagree about the extent to which the decision was exceptionalist.

¹¹⁷ Indeed, there were still notable exceptionalist cases to come, for example, on preemption and the Alien Tort Statute. See, e.g., Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 912–13 (2004); Ku & Yoo, *supra* note 33, at 154. For a “normalization” argument on *Garamendi*, see Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007).

¹¹⁸ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1034 (2003) (“Judges, like the general public and its political leaders, ‘like[] to win wars’ and are sensitive to the criticism that they impede the war effort. Thus, in states of emergency, national courts assume a highly deferential attitude when called upon to review governmental actions and decisions.” (alteration in original) (footnote omitted) (quoting CLINTON ROSSITER & RICHARD P. LONGAKER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 91 (expanded ed. 1976))). For a useful outline of the theories that suggested exceptionalism post-9/11, see Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 231–33. For a pre-9/11 treatment, see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 225 (1998) (“The laws will thus not be silent in times of war, but they will speak with a somewhat different voice.”).

ment naturally invoked the political question doctrine and executive deference.¹¹⁹ Normalization seemed unthinkable.

But surprisingly, the Supreme Court instead delivered an unexpected and remarkable series of losses for the Bush Administration that together mark the second wave of normalization. The first two cases, *Rasul v. Bush*¹²⁰ and *Hamdi v. Rumsfeld*,¹²¹ challenged respectively executive detention of aliens at Guantanamo and of a U.S. citizen held on a naval brig in South Carolina. In *Rasul*, the Court held that the federal habeas statute gave Guantanamo detainees the right to judicial review of their detention,¹²² rejecting the government's argument that the conduct of foreign relations is constitutionally committed to the political branches.¹²³ In *Hamdi*, the Court rejected the argument that it must defer to the government's conclusion — supported by an affidavit — that Hamdi was an "enemy combatant" who could be held without charges until the end of hostilities.¹²⁴ Again, the government's argument was based on the judicial obligation to defer to executive power on both formalist and functionalist grounds. Justice O'Connor's plurality opinion responded by saying that "a state of war is not a blank check."¹²⁵ The Court accordingly held that Hamdi was entitled to notice and a hearing, rejecting the government's argument that military necessity dictated otherwise. The exceptionalist arguments available to the Court were clearly articulated by Justice Thomas, but his dissenting opinion was joined by no other Justice.¹²⁶

The Court cemented the second wave of normalization with two decisions from the beginning of the Roberts Court. In *Hamdan v. Rumsfeld*,¹²⁷ the Court struck down the President's military commissions as inconsistent with a federal statute.¹²⁸ The Court's lack of deference to the executive branch was remarkable. To reach its conclusion, the Court had to reject three distinct arguments offered by the government — first, that the case was not justiciable at all under a federal statute; second, that the commissions were consistent with the substantive statute; and third, that the commissions were not governed

¹¹⁹ See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–77 (2009) (describing cases).

¹²⁰ 542 U.S. 466 (2004).

¹²¹ 542 U.S. 507 (2004).

¹²² *Rasul*, 542 U.S. at 484.

¹²³ Brief for the Respondents at 41, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-333), 2004 WL 425739. The argument itself is not necessarily exceptionalist, but it is unclear whether the government relied ultimately on exceptionalist foundations or on traditional foundations when making it.

¹²⁴ *Hamdi*, 542 U.S. at 509 (plurality opinion).

¹²⁵ *Id.* at 536.

¹²⁶ See *id.* at 579 (Thomas, J., dissenting).

¹²⁷ 548 U.S. 557 (2006).

¹²⁸ *Id.* at 567.

by Common Article III of the Geneva Conventions.¹²⁹ Finally, in *Boumediene v. Bush*,¹³⁰ the Court rejected the government's constitutional argument and held that Guantanamo detainees have a constitutional right to habeas corpus;¹³¹ it also interpreted the Detainee Treatment Act of 2005 as not providing an adequate substitute for habeas.¹³² The Court rejected the government's arguments that cited national security and foreign relations exigency.¹³³

Functional concerns about the conduct of military operations did surface briefly in an opinion denying habeas relief to Americans held in Iraq who wanted to prevent their transfer from U.S. military custody to Iraqi custody.¹³⁴ The focus of the Court's opinion in that case, though, was not executive power, but instead the sovereign rights of Iraq over Iraqi territory.¹³⁵ And although the case was decided in the government's favor, the Court's opinion begins by rejecting a statutory interpretation argument advanced by the government that would have limited the scope of the habeas relief.¹³⁶

With the run of cases finding against the government, scholars increasingly began to explore national security and military issues as if they were "normal" issues. Some scholars picked up on the use of statutory interpretation and argued for applying administrative law principles to national security and foreign relations issues.¹³⁷ Others

¹²⁹ See *id.* at 558–64.

¹³⁰ 553 U.S. 723 (2008).

¹³¹ *Id.* at 771.

¹³² *Id.* at 732–33.

¹³³ Post-*Boumediene*, the Supreme Court has denied certiorari on many petitions from Guantanamo Bay detainees and in other national security- and terrorism-related cases, sometimes over the objection of some Justices, arguably demonstrating a lack of interest by the majority in clarifying the detainees' due process and habeas rights. See Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 133–34 (2011), http://columbialawreview.org/wp-content/uploads/2011/10/122_Vladeck.pdf [<http://perma.cc/2PVY-WYEZ>]. Under this view, *Boumediene* was more an assertion of judicial power by the Court, and less an actual vindication of significant rights of individual Guantanamo detainees. See *id.* at 140. Others have interpreted *Boumediene* through an administrative law lens. See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2050–52 (2011).

¹³⁴ See *Munaf v. Geren*, 553 U.S. 674, 700 (2008) (noting "concerns about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad"). Note that this case is consistent with others in which foreign affairs exceptionalism is used to deny rights to individuals. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010); *Korematsu v. United States*, 323 U.S. 214 (1944).

¹³⁵ *Munaf*, 553 U.S. at 697–700.

¹³⁶ *Id.* at 693–95. The government's argument was supported by *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam).

¹³⁷ See, e.g., Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441 (2005); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); John Yoo, *Administration of War*, 58 DUKE L.J. 2277 (2009).

argued that normalization was taking place throughout the law of detention.¹³⁸ Still others focused on the consequence of litigation for the courts: Guantanamo Bay detainee cases, for example, had become routine in the D.C. Circuit¹³⁹ and a specialized “detainee bar” had emerged.¹⁴⁰ And scholars frequently wrote thematic articles that cut across domestic and foreign affairs.¹⁴¹ That lawyers, judges, and scholars were now deeply engaged with national security issues made those issues seem less exceptional.

The second wave of normalization was particularly important because the war on terror posed the strongest possible challenge to the normalization project. In the context of wartime exigency, in which exceptionalist arguments should be at their strongest and in which the executive branch relied upon those arguments, the Supreme Court continued to proceed with normalization. Equally importantly, just as national security and foreign relations legal issues proliferated during the war on terror, lower court judges, lawyers, and scholars interacted with these issues more frequently, normalizing them in practice. Although incomplete,¹⁴² the trend toward normalization was unmistakable.

C. *The Third Wave: The Roberts Court*

In the last decade, the Roberts Court has ushered in a third wave of normalization. The third wave is characterized by the Court’s treatment of traditional foreign relations issues without relying on exceptionalist reasoning. The trend of normalization in the Roberts Court has gone largely unrecognized (and certainly has not been treated comprehensively), so we give it an extended treatment. By interpreting these developments as normalization, we take a different approach from Professor Harlan Cohen, who has recently argued that changes in the Roberts Court’s treatment of foreign relations cases are the result of a shift from functionalism to formalism, motivated by the Court’s distrust of other constitutional actors, and giving rise to con-

¹³⁸ See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); Huq, *supra* note 118; Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111 (reviewing a variety of foreign relations cases, including *Rasul v. Bush*).

¹³⁹ Stephen I. Vladeck, *Normalizing Guantánamo*, 48 AM. CRIM. L. REV. 1547, 1578 (2011).

¹⁴⁰ THE GUANTÁNAMO LAWYERS (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

¹⁴¹ Examples abound. For a flavor, consider David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009); and David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

¹⁴² The Court has, for example, denied certiorari in several Guantanamo-related cases, *see supra* note 133, and in cases involving the state secrets privilege, *see infra* section IV.E. Some cases that reached the Supreme Court are best characterized as outliers with respect to the trend toward normalization. *See infra* section IV.A.

cerns about an “imperial Court.”¹⁴³ We see these developments not necessarily in terms of overreaching by the Court, but instead as a salutary retreat from all three of the central components of foreign relations exceptionalism — justiciability, federalism, and executive dominance — which may empower lower courts, states, and Congress as well as the Supreme Court.

1. *Justiciability*. — The political question doctrine, which prevents courts from deciding “political” or nonjusticiable issues, has long had special purchase in foreign relations cases.¹⁴⁴ Although the six-factor *Baker v. Carr*¹⁴⁵ test does not explicitly single out foreign relations cases, its focus on prudential considerations such as a lack of respect for or embarrassment to a coordinate branch of government, the need for consistency, and the availability of judicially manageable standards has led courts to apply it broadly in foreign relations cases. Many separation of powers disputes about foreign relations have accordingly been deemed political questions.¹⁴⁶ Lower courts have applied this doctrine especially generously, even in the context of statutory interpretation and international law.¹⁴⁷

In this context, the Court’s decision in *Zivotofsky v. Clinton*¹⁴⁸ is of far-reaching significance.¹⁴⁹ In *Zivotofsky*, the government argued, and the Court of Appeals held, that the political question doctrine prevented courts from deciding if a federal statute or the State Department’s policy legally controls whether U.S. citizens born in Jerusalem should be able to designate their birthplace on U.S. passports as “Israel” (pursuant to the statute) or “Jerusalem” (as entered by the State Department).¹⁵⁰ The Supreme Court rejected the political question doctrine in broad and sweeping terms. Chief Justice Roberts’s opinion

¹⁴³ Cohen, *supra* note 29.

¹⁴⁴ See Nzelibe, *supra* note 33, at 941 (describing and defending the “exceptional treatment that courts accord foreign affairs issues under the political question doctrine”).

¹⁴⁵ 369 U.S. 186 (1962).

¹⁴⁶ See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in the judgment); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001); *Campbell v. Clinton*, 203 F.3d 19, 24–25 (D.C. Cir. 2000) (Silberman, J., concurring); *Lowry v. Reagan*, 676 F. Supp. 333, 338–39 (D.D.C. 1987).

¹⁴⁷ See, e.g., *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007); see also MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 322 (2007) (noting that dismissals based on the political question doctrine are “legion among lower courts” in foreign relations cases); cf. 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, 329 (2002) (arguing that the political question doctrine remains more vibrant in foreign affairs than in other areas).

¹⁴⁸ 132 S. Ct. 1421 (2012).

¹⁴⁹ See Cohen, *supra* note 29 (arguing that “[i]n *Zivotofsky*, the Court reached out to decide the case, not to resolve a circuit split nor even the claim at hand, but to bring discipline to the political question doctrine, to give form to a functionalist doctrine, to bring ordinary judicial scrutiny to political branch foreign affairs decisions,” *id.* (manuscript at 52)).

¹⁵⁰ See *Zivotofsky*, 132 S. Ct. at 1424.

for six members of the Court abandoned the multifactor *Baker v. Carr* test.¹⁵¹ The Court also brushed aside the well-worn arguments that foreign affairs cases pose unique risks for the judiciary and that the political branches have adequate “nonjudicial methods of working out their differences.”¹⁵² Without even citing Justice Rehnquist’s opinion in *Goldwater v. Carter* (a political question doctrine case on treaty termination), and barely mentioning *Baker v. Carr*, Chief Justice Roberts’s opinion emphasized the power — and obligation — of the courts to resolve foreign relations cases, even ones that involve difficult separation of powers questions.¹⁵³ In stark language, he described the ordinary nature of the question:

The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.¹⁵⁴

The Roberts Court also opened the door to more foreign relations cases raising structural constitutional questions when it held in *Bond v. United States*¹⁵⁵ (*Bond I*) that an individual had standing to challenge, on Tenth Amendment grounds, a statute that implemented the Chemical Weapons Convention, a major multinational treaty.¹⁵⁶ The *Bond I* case is not a doctrinal watershed like *Zivotofsky*, but it does reverse some Court of Appeals decisions holding that individuals lack standing to raise Tenth Amendment challenges.¹⁵⁷ In *Bond I* itself, the government conceded that the individual criminal defendant had standing to raise the Tenth Amendment challenge to the statute.¹⁵⁸ Writing for a unanimous Court, Justice Kennedy emphasized that in both federalism and separation of powers cases, individuals are beneficiaries of structurally divided government,¹⁵⁹ a point the Court has underscored in other recent domestic constitutional cases.¹⁶⁰ This em-

¹⁵¹ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁵² *Zivotofsky*, 132 S. Ct. at 1441 (Breyer, J., dissenting) (citing *Goldwater v. Carter*, 444 U.S. 996, 1002, 1004 (1979) (Rehnquist, J., concurring in the judgment)).

¹⁵³ *See id.* at 1428 (majority opinion).

¹⁵⁴ *Id.* at 1427.

¹⁵⁵ 131 S. Ct. 2355 (2011).

¹⁵⁶ *Id.* at 2367.

¹⁵⁷ *See id.* at 2361; *see also* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1437–38 (2013).

¹⁵⁸ *Bond I*, 131 S. Ct. at 2365–66.

¹⁵⁹ *Id.* at 2364–65.

¹⁶⁰ *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (“We recognize, of course, that the separation of powers can serve to safeguard individual liberty”); *id.* at 2592–93

phasis, as well as the Court's related focus on the judicial power and obligation to resolve even difficult structural issues of statutory and constitutional interpretation,¹⁶¹ generally undercuts doctrines that limit judicial involvement in foreign relations cases: standing, the political question doctrine, and broad deference to the executive branch.

Normalizing foreign relations law opens the courtroom doors to important foreign relations cases previously barred on justiciability grounds, especially those raising structural constitutional issues. To be sure, ordinary standing doctrine, especially the restrictions it imposes on cases brought by members of Congress,¹⁶² will continue to impose general limits on structural cases that reach the courts, including foreign relations cases. As described above, however, the Court has unquestionably reduced the justiciability barriers to hearing such cases and in doing so has rejected arguments that foreign relations cases need exceptional treatment.

2. *Federalism.* — Federalism limitations are often said to apply with less force — or not at all — in foreign relations cases, which is another distinctive or exceptional feature of foreign relations law.¹⁶³ In 1968, the Court invalidated an Oregon statute that denied inheritance to nonresidents who lived in countries where an inheritance would be confiscated by the government (in other words, communist countries).¹⁶⁴ The Oregon statute was not preempted by a federal statute, but the Court nonetheless struck it down as an unconstitutional interference with the power of the federal government.¹⁶⁵ Although the Court has not applied this form of “dormant foreign affairs preemption” again,¹⁶⁶ it did hold in *American Insurance Ass'n v. Garamendi*¹⁶⁷ that a presidential policy of settling the claims of Holocaust survivors through international agreements preempted a California statute, an example of both federalism and executive power exceptionalism.¹⁶⁸ The Supreme Court has also treated statutory in-

(Scalia, J., concurring in the judgment) (citing *Bond I*); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577–79 (2012) (citing *Bond I*).

¹⁶¹ See *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427–28 (2012); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881–82 (2013) (Roberts, C.J., dissenting).

¹⁶² See, e.g., *Raines v. Byrd*, 521 U.S. 811, 830 (1997).

¹⁶³ See Bradley, *New American*, *supra* note 23, at 1093; Young, *Dual Federalism*, *supra* note 24, at 140; *supra* pp. 1915–16. For an argument that courts' evaluation of state and federal interests does and should vary based on geopolitical circumstances, see Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 728 (2013).

¹⁶⁴ *Zschemig v. Miller*, 389 U.S. 429 (1968).

¹⁶⁵ *Id.* at 441.

¹⁶⁶ Lower courts have, however. See, e.g., *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076–77 (9th Cir. 2012) (en banc); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010).

¹⁶⁷ 539 U.S. 396 (2003).

¹⁶⁸ *Id.* at 401.

terpretation differently in foreign relations cases that raise federalism issues. The Court has suggested, for example, that there is a presumption *in favor* of preemption in the foreign relations context, rather than the usual presumption *against* preemption.¹⁶⁹ Even without a presumption, foreign relations statutes are sometimes interpreted generously to preempt state law.¹⁷⁰ While the Court declined a recent opportunity to revisit *Missouri v. Holland*, it has nonetheless taken significant steps to normalize federalism analysis in both statutory interpretation and executive preemption cases.

Start with statutory interpretation cases. In *Bond v. United States*¹⁷¹ (*Bond II*) the Court analyzed the Chemical Weapons Convention Implementation Act to determine whether it reached the defendant's alleged conduct: attempting to poison her former friend due to a romantic dispute. Although the Court might have construed the statute broadly in light of the federal government's strong interest in foreign affairs and treaty implementation, instead the Court analyzed it like any regular statute on domestic affairs. Most significantly, for the first time in a foreign relations case, the Court applied a federalism-based clear statement rule to "insist on a clear indication that Congress meant [the statute] to reach purely local crimes" and thereby intrude on the police power of the States.¹⁷² This clear statement rule was drawn from domestic statutory interpretation cases, in particular *Gregory v. Ashcroft*.¹⁷³

In statutory preemption cases raising foreign relations issues, the Court has often favored preemption — whether explicitly or implicitly.¹⁷⁴ The reasoning in *Bond II* suggests, however, that statutory interpretation in foreign relations cases ought not reflect special needs or powers of the federal government. The Chief Justice's opinion for the Court in *Chamber of Commerce v. Whiting*,¹⁷⁵ an immigration case holding that an Arizona business licensing statute was not preempted, also eschews any foreign relations exceptionalism, instead treating the preemption as business-as-usual, drawing on cases and doctrine interpreting statutes that lack any connection to foreign relations.¹⁷⁶ The *Whiting* opinion included no language about broad executive and fed-

¹⁶⁹ See *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941).

¹⁷⁰ See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–74 (2000).

¹⁷¹ 134 S. Ct. 2077 (2014).

¹⁷² *Id.* at 2081–82.

¹⁷³ 501 U.S. 452, 461 (1991). The Court's decision might be viewed as exceptionalist because interpreting the statute as inapplicable to Bond's conduct meant that the Court did not have to reach the constitutional issue in the case and reconsider *Missouri v. Holland*, arguably an exceptionalist opinion. See *supra* pp. 1916–17.

¹⁷⁴ See *Crosby*, 530 U.S. 363; *Hines*, 312 U.S. 52.

¹⁷⁵ 131 S. Ct. 1968 (2011).

¹⁷⁶ *Id.*

eral authority in foreign relations cases,¹⁷⁷ and the Court held against the federal government.¹⁷⁸ Justice Breyer's dissenting opinion also avoided relying on broad statements of the "foreign affairs" powers of the President and the federal government.¹⁷⁹ Apparently the Justices did not view *Whiting* as a foreign relations case, but that conclusion was far from obvious.¹⁸⁰ Immigration cases have generally moved toward normalization and away from the plenary power doctrine and other exceptionalist analysis,¹⁸¹ but outliers remain.¹⁸²

Now consider cases on executive preemption of state law. Although best known as a case on treaty self-execution and interpretation,¹⁸³ *Medellín v. Texas*¹⁸⁴ also involved a directive by the President ordering Texas to implement a judgment of the International Court of Justice (ICJ).¹⁸⁵ The Court acknowledged that the ICJ judgment was binding on the United States as a matter of international law but held that the treaty provision imposing the international obligation was not self-executing. The Court thus had to decide whether the President could implement a non-self-executing treaty obligation as a matter of domestic law binding on Texas courts.¹⁸⁶ The Court had already held that the President has the power to implement sole executive agreements in *Dames & Moore v. Regan*¹⁸⁷ and even the President's *policy*

¹⁷⁷ *Id.* at 1983.

¹⁷⁸ *Id.* at 1984–85.

¹⁷⁹ *Id.* at 1987–97 (Breyer, J., dissenting).

¹⁸⁰ See Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 339 ("As Rick Hills has noted, '[t]he surprising aspect of *Whiting* . . . is that the Roberts Court's analysis of preemption was so conventional'; the Court 'brushed aside the idea that Arizona encroached on a forbidden federal field of foreign relations law.'" (alteration and omission in original) (quoting Roderick M. Hills Jr., *Preemption Doctrine in the Roberts Court: Constitutional Dual Federalism by Another Name?* (N.Y. Univ. Sch. of Law Pub. Law Research Paper No. 11-69, 2011))).

¹⁸¹ See *infra* section IV.A. (discussing *Arizona v. United States*, 132 S. Ct. 2492 (2012)); see also Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 386–87 (2007) (discussing recent cases that limit the plenary power doctrine, including *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) and *Nguyen v. INS*, 533 U.S. 53 (2001)).

¹⁸² See *Demore v. Kim*, 538 U.S. 510, 531 (2003).

¹⁸³ See, e.g., David J. Bedermen, *Medellín's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529 (2008).

¹⁸⁴ 552 U.S. 491 (2008).

¹⁸⁵ *Id.* at 498.

¹⁸⁶ For an argument that the doctrine of non-self-executing treaties applied in *Medellín* does not comport with constitutional text and history (and therefore could be characterized as exceptionalist), see Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 611 (2008).

¹⁸⁷ 453 U.S. 654, 682–83 (1981); see also *United States v. Pink*, 315 U.S. 203, 229 (1942) ("The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees."); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (finding that an international compact recognizing the Soviet Union could be undertaken unilaterally).

related to such agreements in *Garamendi*.¹⁸⁸ Although these cases all involve separation of powers questions, as discussed below, they are federalism cases as well: in all three, the key question was whether presidential action, absent Congress, could effectively preempt or displace otherwise applicable state law. In *Dames & Moore* and *Garamendi*, the Court held in favor of presidential power.

In comparison with *Dames & Moore* and *Garamendi*, the power asserted by the President in *Medellín* was arguably more modest, and yet the case came out the other way. The President's claim of power was based on an Article II treaty, a source of domestic law specifically identified as such by the Supremacy Clause.¹⁸⁹ Still, the Court rejected the government's argument, reasoning that the President lacked the power to implement a non-self-executing treaty through a directive that "reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws."¹⁹⁰ While the Court did not reverse *Dames & Moore* and *Garamendi*, it distinguished the cases, limiting the expansive presidential authority only to the narrow context of settling claims.¹⁹¹ As a result, the State of Texas won. The outcome and reasoning in *Medellín* represented a major step in normalizing foreign relations law. The Court did not rely on the unique needs of the President or the federal government, but instead applied basic separation of powers and federalism principles.¹⁹²

3. *Executive Dominance*. — Executive dominance is the most distinctive and important aspect of U.S. foreign relations law. Limitations on access to the courts and relaxed federalism constraints, as described in the two prior sections, both generally result in enhanced power of the executive branch. Foreign relations exceptionalism has inexorably led to "the increased hegemony of the Presidency and the Department of State as America's principal foreign policymakers."¹⁹³ Writing in 1972 and again in 1996, Professor Louis Henkin observed that "[s]tudents of United States government, and newspaper-readers generally, know that U.S. foreign relations are in the charge of the President."¹⁹⁴ In recent years, however, the Court has delivered a series of defeats to the executive branch in cases on executive power and statutory interpretation. Building on its decision in *Hamdan*, the Court has recently rejected foreign affairs exceptionalism in the sepa-

¹⁸⁸ 539 U.S. 396, 414–16 (2003).

¹⁸⁹ See *Medellín*, 552 U.S. at 523 n.13.

¹⁹⁰ *Id.* at 532.

¹⁹¹ See *id.* at 531.

¹⁹² See *id.* at 525–32.

¹⁹³ White, *supra* note 3, at 3.

¹⁹⁴ HENKIN, *supra* note 103, at 31. The same language appeared in the first edition from 1972.

ration of powers context. This dramatic normalization of U.S. foreign relations occurred in *Medellín*, discussed above in the context of federalism.¹⁹⁵ In *Medellín*, the President ordered the State of Texas to implement a judgment of the ICJ.¹⁹⁶ Although the judgment could have been implemented without constitutional difficulty through either a self-executing treaty or a statute, in this case there was neither.¹⁹⁷ In its amicus brief, the United States asserted that the President's actions were justified based on implied authorization from Congress and on his own constitutional powers in foreign affairs.¹⁹⁸ In a series of prior cases, the Court had relied on strained arguments about congressional authorization and on cursory constitutional reasoning to hold in favor of executive power.¹⁹⁹ The Court had held, for example, that the President had the power to implement sole executive agreements in *Belmont*²⁰⁰ and in *Dames & Moore*,²⁰¹ to implement the President's policy related to such agreements in *Garamendi*,²⁰² and to dictate the outcome of cases against foreign sovereigns.²⁰³

Yet the Chief Justice, writing for the Court in *Medellín*, rejected both the government's treaty-based and constitutional arguments. The government maintained that the treaty in question should be read as authorizing domestic implementation by the President, or at least that Congress had acquiesced to such implementation. The Court not only disagreed with this argument, but it also held that by ratifying the treaties as implicitly non-self-executing, the Senate implicitly *prohibited* the President from making the treaty binding on domestic courts.²⁰⁴ This conclusion is weak. The doctrine of self-execution itself was notoriously unclear, to say nothing of its relationship to presidential power.²⁰⁵ The treaties were silent on the issue of self-execution, an issue that generated disagreement among the Justices.²⁰⁶ It is accordingly very difficult to conclude that the Senate had any understanding of what the fact of non-self-execution would mean for the President's ex-

¹⁹⁵ See *supra* section II.C.2.

¹⁹⁶ *Medellín*, 552 U.S. at 503.

¹⁹⁷ See *id.* at 505–06.

¹⁹⁸ *Id.* at 525.

¹⁹⁹ See *supra* notes 187–188 and accompanying text.

²⁰⁰ 301 U.S. 324, 330 (1937).

²⁰¹ 453 U.S. 654, 682–83 (1981).

²⁰² 539 U.S. 396, 414–16 (2003).

²⁰³ *Ex parte* Republic of Peru, 318 U.S. 578, 588–89 (1943); see also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”).

²⁰⁴ *Medellín v. Texas*, 552 U.S. 491, 527 (2008).

²⁰⁵ See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695–97 (1995).

²⁰⁶ See *Medellín*, 552 U.S. at 514.

executive power. In past cases, the Court had engaged in strained statutory interpretation to find congressional authorization — but here the strained interpretation had the effect of curtailing, not enhancing, the President’s power in a case involving “compelling” foreign policy interests.²⁰⁷ The Chief Justice’s opinion went on to make short work of the executive branch’s constitutional argument, distinguishing *Dames & Moore* and *Garamendi* based upon the “Executive’s narrow and strictly limited authority to settle international claims”²⁰⁸ and reasoning that even compelling foreign policy arguments do not allow the Court to “set aside first principles” of constitutional separation of powers.²⁰⁹

The executive branch has not fared well in the statutory context either. In *Kiobel*,²¹⁰ *Morrison*,²¹¹ *Bond II*,²¹² and *NML Capital*,²¹³ the Court rejected the views of the executive branch. In the first two of these cases the issue before the Court was whether the presumption against extraterritoriality should apply to a statute — the Alien Tort Statute in *Kiobel* and the Securities Exchange Act in *Morrison*. Although the Court reached the specific outcome sought by the government in each of these cases, it also held that the presumption against extraterritoriality applied to the statutes in question, contrary to the views of the executive branch.²¹⁴ While the executive seems better situated than the judiciary to evaluate whether extraterritorial application of the statute might generate foreign policy problems (one basis for adopting the presumption²¹⁵), and a case-by-case approach to the reach of the statutes would afford more control to the executive branch, foreign relations exceptionalism was nowhere to be found. These cases are consistent with opinions from the Rehnquist Court that afforded the executive no special deference in interpreting foreign relations statutes.²¹⁶

The Court’s opinion in *NML Capital* also rejected the State Department’s statutory interpretation — but unlike a similar decision from a decade ago, it did not explicitly suggest that the government would be afforded case-by-case deference to its views. The Court held

²⁰⁷ *Id.* at 524.

²⁰⁸ *Id.* at 532.

²⁰⁹ *Id.* at 524.

²¹⁰ 133 S. Ct. 1659, 1669 (2013).

²¹¹ 130 S. Ct. 2869, 2888 (2010).

²¹² 134 S. Ct. 2077 (2014).

²¹³ 134 S. Ct. 2250, 2258 (2014).

²¹⁴ *Kiobel*, 133 S. Ct. at 1668; *Morrison*, 130 S. Ct. at 2882–83.

²¹⁵ See, e.g., *Kiobel*, 133 S. Ct. at 1664 (“This presumption ‘serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.’” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))).

²¹⁶ See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 701–02 (2004).

that the Foreign Sovereign Immunities Act of 1976²¹⁷ (FSIA) does not limit the scope of discovery available against a foreign sovereign in a post-judgment execution action.²¹⁸ The Court rejected the U.S. government's arguments (advanced in an amicus brief) that focused on the negative impact such discovery could have for U.S. interests, including potentially damaging U.S. relations with Argentina and making the United States more vulnerable to discovery in foreign courts.²¹⁹ The Court also rejected both the government's general argument with respect to discovery against foreign sovereigns under the FSIA, and the government's case-specific argument that the discovery order was too broad.²²⁰ Unlike *Republic of Austria v. Altmann*,²²¹ which also interpreted the FSIA without deferring to the U.S. government's position, *NML Capital* made no suggestion that the government's views might even be entitled to case-by-case deference.²²²

In some contexts the Roberts Court has eschewed multifactor balancing tests in favor of bright-line rules, in part on the grounds that the former vest too much authority with the courts. The result has been to further shift power toward Congress at the expense of the executive. This theme is prevalent in the self-execution holding of *Medellín* and in *Morrison* and *Kiobel*.²²³ In deciding to apply the presumption against extraterritoriality to the Securities Exchange Act, for example, the Court reasoned in *Morrison* that “[t]he results of judicial-speculation-made-law — divining what Congress would have wanted if it had thought of the situation before the court — demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.”²²⁴ Similarly, Chief Justice Roberts rejected the dissent's analysis of treaty self-execution in *Medellín*, calling it “arrestingly indeterminate” and ultimately based on “ad hoc judicial assessment.”²²⁵ All three decisions used bright-line rules and presumptions

²¹⁷ Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

²¹⁸ *NML Capital*, 134 S. Ct. at 2258.

²¹⁹ See Brief for the United States as Amicus Curiae in Support of Petitioner at 10, 18–22, *NML Capital*, 134 S. Ct. 2250 (No. 12-842), 2014 WL 827994.

²²⁰ See *NML Capital*, 134 S. Ct. at 2258.

²²¹ 541 U.S. 677 (2004).

²²² Compare *Altmann*, 541 U.S. at 701–02, with *NML Capital*, 134 S. Ct. at 2258.

²²³ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (discussing Congress's need to explicitly write extraterritoriality into a statute). Similarly, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Court rejected suppression of evidence as a remedy for a treaty violation, because the treaty did not explicitly provide that remedy, and because implying such a remedy would “enlarge] the obligations of the United States” under the treaty, something “entirely inconsistent with the judicial function.” *Id.* at 346.

²²⁴ *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010).

²²⁵ *Medellín v. Texas*, 552 U.S. 491, 515 (2008).

primarily to enhance the power of Congress, rather than that of the President.

Normalization of foreign relations is also evident in cases that are more likely to be characterized as administrative law cases. *United States v. Eurodif S.A.*,²²⁶ for example, involved a challenge to the Commerce Department's imposition of trade duties on imported refined uranium.²²⁷ The federal government argued that the case raised significant national security concerns,²²⁸ but the Court gave this view no special deference; instead, it simply applied *Chevron* and held for the government.²²⁹ The government also argued in *Eurodif* that *Chevron* applied,²³⁰ so the Court's reasoning was not surprising, but it does illustrate the applicability of standard administrative law analysis in foreign relations cases. Another example of normalization is Chief Justice Roberts's dissenting opinion in *City of Arlington v. FCC*,²³¹ in which he explicitly linked the *Chevron* "step-zero"²³² inquiry in administrative law to the political question doctrine in foreign relations law. The question in that case was whether agencies receive *Chevron* deference for determinations of the scope of their authority. In his dissent, the Chief Justice came down strongly in favor of careful scrutiny of the executive branch. Acknowledging that the majority was correct that "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive," he nonetheless concluded in favor of "another concern at play, no less firmly rooted in our constitutional structure," namely "the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well."²³³ He continued, "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive" — and he then cited to *Zivotofsky*.²³⁴ While the Chief Justice wrote in dissent, he clearly saw the link between cases that are "foreign" and "domestic."

²²⁶ 555 U.S. 305 (2009).

²²⁷ *Id.* at 308. See generally L. Rush Atkinson, Note, *Guns, Butter, and Judges: Judicial Frameworks for Cases Implicating Security-Wealth Tradeoffs*, 85 N.Y.U. L. REV. 587 (2010) (outlining a perceived shift whereby the Court applied *Chevron* to cases implicating national wealth considerations that were previously adjudicated under foreign relations doctrines).

²²⁸ Brief for the United States at 22, *Eurodif*, 555 U.S. 305 (Nos. 07-1059, 07-1078), 2008 WL 2794014.

²²⁹ *Eurodif*, 555 U.S. at 316, 322.

²³⁰ Brief for the United States, *supra* note 228, at 18.

²³¹ 133 S. Ct. 1863 (2013).

²³² See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

²³³ *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting).

²³⁴ *Id.*

D. Conclusion: The Second Revolution in Foreign Relations Law

Individually, the Court's decisions might not seem like much (though many of these cases were understood immediately as significant²³⁵), but together the Court's decisions over the last quarter century on political questions, standing, federalism, preemption, statutory interpretation, and executive power form an unmistakable pattern of normalization across the most important debates in foreign relations law over the last century. This normalization trend is particularly significant because it continued even in the midst of war, when one would expect exceptionalist arguments to be at their zenith.

This pattern of treating foreign relations law as ordinary law amounts to a second revolution in foreign relations law, on par with the Sutherland revolution in the early twentieth century. Although the second revolution may not reverse the particular holdings of the Sutherland cases, normalization is in many ways a counter-revolution because it is eliminating exceptionalist reasoning from foreign relations law. Where the rise of exceptionalism meant nonjusticiability, normalization increases the courts' involvement in adjudicating disputes. Where the rise of exceptionalism meant federal power trumped the states, normalization requires courts to follow routine preemption and federalism analyses. And where the rise of exceptionalism meant expansive deference to the executive, normalization means the executive cannot count on vague claims of foreign policy expertise to win.

III. FOREIGN RELATIONS LAW AS ORDINARY LAW

Perhaps the biggest concern about normalization is that treating foreign relations as akin to ordinary domestic law would undermine the important justifications for exceptionalism: expertise, speed, secrecy, flexibility, error costs, and the nature of the subject matter. In this Part, we evaluate these justifications and show that the case for exceptionalism is weak. Foreign affairs issues, it turns out, raise the same competing separation of powers values that arise in the domestic context, and the purported differences between foreign and domestic affairs are often overstated.

²³⁵ See, e.g., Chimene Keitner, *Kiobel Insta-Symposium: The ATS After Kiobel: Less Bark but More Bite?*, OPINIO JURIS (Apr. 18, 2013, 12:27 AM), <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-the-ats-after-kiobel-less-bark-but-more-bite> [http://perma.cc/L346-NB92]; Peter Spiro, *In Other Supreme Court News: Political Question Doctrine Takes a Hit in Jerusalem Passport Case*, OPINIO JURIS (Mar. 26, 2012, 11:49 AM), <http://opiniojuris.org/2012/03/26/in-other-supreme-court-news-political-question-doctrine-takes-a-hit-in-jerusalem-passport-case> [http://perma.cc/77P4-MMQH]; Ernie Young, *Medellin v. Texas: Another Set of Early Thoughts*, OPINIO JURIS (Mar. 25, 2008, 4:36 PM), <http://opiniojuris.org/2008/03/25/medellin-v-texas-another-set-of-early-thoughts> [http://perma.cc/2TSP-R7BR].

A. Expertise

Perhaps the strongest justification for executive power, vis-à-vis Congress and the courts, is that the executive branch has greater expertise on foreign affairs issues than the other branches.²³⁶ The argument has a number of components. First, the executive simply knows more about what is happening in other countries.²³⁷ Second, the executive has greater institutional capacity — in terms of staff, materials, and background — to evaluate and consider international issues.²³⁸ Third, judges are thought to be particularly bad at addressing foreign affairs issues because they are generalists with little expertise in the subject matter,²³⁹ courts only engage in these issues “episodic[ally],”²⁴⁰ and the sources used (treaties, customary international law, etc.) are unfamiliar.²⁴¹ Thus, scholars have argued that judges should defer to executive decisions because the executive “tracks relations with foreign states” more closely than other branches and is therefore “in a better position to predict whether a particular act of deference to foreign interests” will be beneficial or harmful to the United States.²⁴² Finally, some have argued that the courts do not have the institutional competence or resources to “track the evolution of international norms that govern the meaning of the terms” in foreign relations law.²⁴³ On this argument, vague terms like “declare war” change over time in international law and practice, and the executive is best suited to interpret these changes.

But it is not obvious how the expertise justification is different in kind (or even in degree) from the executive’s comparative expertise in domestic affairs. It is undoubtedly true that members of the executive branch know more about events in other countries than do judges or even Congress, but it is equally true that they know more about food and drug policy, environmental policy, banking regulation, and Medicare reimbursements. Nor is it satisfactory to respond that foreign affairs require “political” judgment rather than “technocratic” judgment. Although there are surely gradations, it is hardly clear that the decision to regulate smoking under the Federal Food, Drug, and

²³⁶ Posner & Sunstein, *supra* note 33, at 1202.

²³⁷ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

²³⁸ See Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 128 (2009); see also Nzelibe, *supra* note 33, at 986.

²³⁹ See Knowles, *supra* note 238, at 128 (citing *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979)).

²⁴⁰ Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805, 809 (1989).

²⁴¹ See *id.*

²⁴² Posner & Sunstein, *supra* note 33, at 1205.

²⁴³ Nzelibe, *supra* note 33, at 944.

Cosmetic Act was “technocratic,”²⁴⁴ while the negotiation and implementation of the Basel III accords on financial regulation was “political.”²⁴⁵ Similarly, the executive bureaucracy has greater institutional resources — in terms of staff, funding, and the like — to monitor and direct foreign affairs. But this is no different from the situation in domestic affairs. Indeed, one — if not *the* central — purpose and justification for the New Deal administrative state was that executive branch bureaucrats would be expert policymakers who would have greater competence, knowledge, and resources than members of the other branches, and would therefore be better at setting public policy.²⁴⁶ And yet, in the domestic context, the legal system does not grant ill-defined constitutional power to the executive on claims of expertise. Rather, the Administrative Procedure Act provides a series of nuanced processes and participatory mechanisms that at once enable and constrain executive branch power.

The claims of judicial incompetence are equally inapposite. If the fact that judges are generalists should disqualify them from adjudicating foreign relations issues, it should also disqualify them from adjudicating most other issues in the federal courts. A particular judge might not hear many cases touching on foreign relations in her career, but she also might not hear many antitrust cases, separation of powers cases, or endangered species cases — all areas considered to be eminently within the domain of the judiciary. Indeed, no particular judge is likely to be an expert in every area of law, but the structure of the legal system assumes this, requiring attorneys to provide courts with information.²⁴⁷ To the extent that frequency of cases leads to expertise, judicial incompetence is equally solvable by courts taking a more active role in adjudicating foreign affairs issues.²⁴⁸ In other words, the normalization of foreign relations will, over time, make the judiciary more competent than it currently is.²⁴⁹ Claims that the judiciary should defer to executive branch interpretations of constitutional or international law are particularly confusing. To the extent one believes that terms in the Constitution are evolving, it is not clear why the ex-

²⁴⁴ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2001).

²⁴⁵ For an overview of the accords, see *Basel Regulatory Framework*, BOARD GOVERNORS FED. RES. SYS., <http://www.federalreserve.gov/bankinfo/basel/default.htm> (last updated Oct. 25, 2013) [<http://perma.cc/HG97-G2ZH>].

²⁴⁶ See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 15–16 (1938); see also Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1282–83 (1984); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678 (1975).

²⁴⁷ Charney, *supra* note 240, at 809.

²⁴⁸ See Knowles, *supra* note 238, at 129; Spiro, *supra* note 23, at 677.

²⁴⁹ Indeed, this may already be happening, at least with respect to the D.C. District and Circuit Courts' adjudication of detainee cases arising from Guantánamo Bay, Cuba.

executive branch should have greater authority to determine their evolving meaning than the judicial branch. Determining the meaning of “declare war” over time seems hardly more complicated than determining the meaning of “cruel and unusual.” This interpretive function is at the core of what courts do.²⁵⁰ In that light, claims of judicial incompetence are no different than they are in domestic affairs. The answer in the domestic context, however, has not been to grant expansive deference to all executive branch actions. Rather, executive branch actions receive varying degrees of deference,²⁵¹ governed by classic administrative law cases including *Chevron* and *Skidmore*.

B. Speed

Another prominent justification for exceptionalism in foreign affairs is the need for quick actions.²⁵² The pedigree of the claim is strong, rooted in Alexander Hamilton’s famous statement that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”²⁵³ Scholars thus argue that speed is a “general characteristic of foreign relations, one that makes that area particularly resistant to regulation by broad rules set out in advance by statute or by the judiciary.”²⁵⁴

The problem is that speed is not a “general characteristic” of foreign affairs, nor is it even a distinct characteristic. Quick action might often be necessary in matters of war and crisis, but many foreign affairs issues do not require great haste. Treaty negotiations, for exam-

²⁵⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁵¹ See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (arguing that the Supreme Court does not use a “*Chevron*-or-nothing approach,” *id.* at 1098, but rather employs a number of deferential standards including *Chevron* and *Skidmore*).

²⁵² See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936); BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK* 45–47, 109 (2006) (arguing for the need for speed in decisionmaking after a terrorist attack); EDWARD S. CORWIN, *THE PRESIDENT 201* (5th rev. ed. 1984) (noting “the *unity* of the office [of the President], its capacity for *secrecy* and *dispatch*, and its superior sources of *information*; to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time”); KOH, *supra* note 86, at 119 (noting that the President’s “decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match”); Ku & Yoo, *supra* note 33, at 193 (noting that the executive is structured for speed and secrecy in foreign affairs); Posner & Sunstein, *supra* note 33, at 1202; John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1676 (2002) (“[A] unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.”).

²⁵³ THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

²⁵⁴ Posner & Sunstein, *supra* note 33, at 1217.

ple, can drag on for years; the case for executive dispatch in those cases is by no means self-evident. Similarly, the need for speed is not unique to foreign affairs. In a crisis or emergency, whether foreign or domestic, speed might be highly prized. As Professors Eric Posner and Adrian Vermeule have shown, crises implicating “foreign” and “domestic” concerns actually have a similar anatomy in terms of the government response.²⁵⁵ In other words, the foreign/domestic categorization is poorly tailored to the need for speed. A more reasonable argument is that speed is necessary in emergencies, foreign or domestic, and less necessary in non-emergency conditions.

C. Flexibility

A related, but distinct, justification is that foreign affairs are characterized by an inherent need for flexibility.²⁵⁶ One scholar captures the argument well: “Because the world is inherently anarchic and thus unstable, flexibility is crucial. Because the meaning of international law changes with subtly shifting power dynamics, the United States must be capable of quickly altering its interpretation of laws in order to preserve its advantage and avoid war if possible.”²⁵⁷ The flexibility argument is predicated on certain assumptions about the background conditions of foreign affairs, and those assumptions are problematic for three reasons. First, people can disagree about the nature of foreign affairs. The flexibility argument assumes a realist approach to the world, in which global affairs are “anarchic and thus unstable.”²⁵⁸ But not everyone views international affairs that way. Some scholars, for example, have argued that the world is actually better divided into an anarchic sphere and a “liberal” sphere, the latter characterized by the rule of law, democracy, stability, and peace.²⁵⁹ Exceptionalism, it follows, should apply only in the former realm. Other scholars have argued that the current international system is defined by American hegemony and dominance, not instability, which leads to other conclusions altogether.²⁶⁰ Depending on one’s diagnosis of international affairs, the flexibility argument is more or less persuasive.

Second, even assuming that the international realm is dynamic and unstable and that the executive’s ability to be more flexible would be useful, it is not clear how this differs from domestic affairs. The tech-

²⁵⁵ Posner & Vermeule, *supra* note 141, at 1636–39.

²⁵⁶ See KOH, *supra* note 86, at 119; Nzelibe, *supra* note 33, at 977; Posner & Sunstein, *supra* note 33, at 1217.

²⁵⁷ Knowles, *supra* note 238, at 134.

²⁵⁸ *Id.*

²⁵⁹ See, e.g., Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1999–2002 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* (1992)).

²⁶⁰ See generally Knowles, *supra* note 238.

nology and financial sectors, to take two examples, are extremely dynamic areas in domestic affairs. Yet it seems doubtful that anyone would seriously argue that the courts should grant special, expansive deference to the decisions of the FCC or SEC. Indeed, dynamism is one of the typical justifications for creating regulatory agencies — and for granting them deference under standard administrative law practices. It is not clear why foreign affairs requires *greater* deference.²⁶¹

Finally, flexibility is better understood as a value that should be optimized, not maximized. Given scarce decisionmaking resources, it may be better under some conditions to make decisions earlier rather than seek greater flexibility by postponing decisions. In a study of the response to Hurricane Katrina, for example, Professor David Super concludes that programs built around preserving flexibility of decisionmaking during the crisis “failed badly through a combination of late and defective decisions.”²⁶² In contrast, programs that “developed detailed regulatory templates in advance provided quick and effective relief.”²⁶³ It is thus not obvious that flexibility, rather than preplanning, is optimal from a decisionmaking standpoint.

D. Secrecy

Scholars and courts often suggest that foreign affairs are different from domestic affairs in that the need for secrecy is paramount in the former.²⁶⁴ But as with speed and flexibility, secrecy doesn’t map neatly onto foreign relations issues. As has been recognized since the time of the *Federalist Papers*, the case for secrecy is perhaps strongest when it comes to treaty negotiations and intelligence issues.²⁶⁵ But those is-

²⁶¹ Professors Eric Posner and Cass Sunstein also argue that flexibility is a standard justification in the domestic regulatory realm, and they claim that they “merely extend this rationale to foreign relations.” Posner & Sunstein, *supra* note 33, at 1217. But their specific proposal goes much further. Rather than seeking to apply *Chevron* on its own terms to foreign affairs decisions, they want to apply *Chevron*-style deference to a broader set of agency actions — and they want executive preferences to trump judicial canons of interpretation. For a full discussion of this issue, see *infra* section IV.C, pp. 1958–70.

²⁶² David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1375 (2011).

²⁶³ *Id.*

²⁶⁴ See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (“Secrecy in respect of information gathered by [the President and his agents] may be highly necessary, and the premature disclosure of it productive of harmful results.”); see also *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”); Nzelibe, *supra* note 33, at 986; Posner & Sunstein, *supra* note 33, at 1202.

²⁶⁵ See, e.g., THE FEDERALIST NO. 64, *supra* note 253, at 390–91 (John Jay) (“It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. . . . [T]here doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly.”); Pozen, *supra* note 141, at 277.

sues are not coextensive with foreign affairs. In fact, secrecy does not seem particularly relevant to a variety of issues in foreign relations — immigration, border policies, alien tort litigation, and foreign sovereign immunity. And at the same time, secrecy is absolutely necessary in a variety of domestic policy issues. Law enforcement uses secrecy to “protect[] against the disclosure of confidential sources and law enforcement techniques, safeguard[] the privacy of those involved in a criminal investigation, and otherwise prevent[] interference with a criminal investigation.”²⁶⁶ Secrecy is also essential to the operation of the domestic banking system. The Federal Deposit Insurance Commission (FDIC) keeps a secret list of troubled banks that are at risk of failing. The purpose of secrecy in this context has nothing to do with national security — secrecy prevents a run on the banks.²⁶⁷

In sum, as a justification for foreign affairs exceptionalism, secrecy is relatively weak. Some particular topics or issues may require greater secrecy, but that is true of specific areas in domestic affairs as well.²⁶⁸ To the extent secrecy is necessary, there are statutory systems designed specifically to preserve secrecy in judicial proceedings on foreign affairs.²⁶⁹ Moreover, to the extent that the judicially created state secrets privilege and bar against suits that depend on the “existence of [agents’] secret espionage relationship with the Government” are justified at all,²⁷⁰ they provide no basis for foreign affairs exceptionalism generally, and are instead best analogized to similar doctrines in domestic law such as the law enforcement privilege. Although these doctrines have sometimes been defended and even expanded based on exceptionalist reasoning, especially by lower courts,²⁷¹ it is their

²⁶⁶ Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1579 (2002) (describing the “law enforcement privilege”).

²⁶⁷ See Jacob Leibenluft, *What’s a Bank Run? And How Do You Get on the FDIC’s Secret Problem List?*, SLATE (July 18, 2008, 5:15 PM), <http://www.slate.com/id/2195524> [<http://perma.cc/3GTV-T6G6>].

²⁶⁸ See generally Pozen, *supra* note 141 (discussing and analyzing the need for secrecy throughout the executive branch, not just in the context of foreign relations).

²⁶⁹ See, e.g., Classified Information Procedures Act, 18 U.S.C. app. 3 (2012).

²⁷⁰ *Tenet v. Doe*, 544 U.S. 1, 8 (2005); see also *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Totten v. United States*, 92 U.S. 105, 107 (1875).

²⁷¹ See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081–82 (9th Cir. 2010); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (“[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.”); *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007) (“Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.”).

exceptionalist aspects that have generated the greatest controversy and potential for abuse,²⁷² as discussed below in Part IV.

E. The Subject Matter of Foreign Affairs

Another prominent argument for foreign affairs exceptionalism is that foreign relations covers topics related to the interactions between sovereign governments — in particular, military and diplomatic issues.²⁷³ These kinds of interactions are particularly unsuited to judicial or even congressional involvement, the argument goes, because the country needs to speak and act with a single voice when interacting with foreign sovereigns.²⁷⁴ A related concern is that individual states can externalize the costs of violating international law, because retaliation for the offense would be visited on the nation as a whole.²⁷⁵

The trouble with this approach, as some commentators have noted, is that foreign relations is no longer limited to interactions between sovereigns,²⁷⁶ and nation states understand that international law involves a wide variety of actors and issues. Globalization and economic integration and advances in transportation, technology, and communications have fundamentally transformed foreign relations, so that it now engages with basic economic issues traditionally understood to be part of domestic affairs. In a wide variety of areas, ranging from Internet communications to banking regulation, governments are increasingly finding it useful to cooperate to adopt common standards.²⁷⁷ While international agreements or common standards could be seen as “foreign relations,” they do not fall within the traditional justification of interactions between sovereigns. Indeed, corporations, interest groups, nonprofit organizations, and other non-sovereign entities have strong preferences on these issues and seek to participate in

²⁷² See *infra* pp. 1978.

²⁷³ See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1670 (1997). A variation on this argument is that foreign relations and national security agencies work under different conditions of interest group politics, and for this reason should be treated differently than domestic agencies. See AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JSC, AND NSC* 39 (1999) (arguing, for example, that “in foreign affairs, interest groups are relatively new, fluid, and weak”). Assuming that this argument is correct, it would only support judicial exceptionalism in situations where the doctrinal analysis is based on interest group politics. Even then the analysis would need to proceed agency by agency, and would be likely to change over time as different agencies attract different interest groups.

²⁷⁴ See David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 953 (2014).

²⁷⁵ Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1517 (2011).

²⁷⁶ Goldsmith, *supra* note 273, at 1672.

²⁷⁷ DAVID SINGH GREWAL, *NETWORK POWER* 3–6 (2008). For an overview of the past and future of international banking agreements, see, for example, CHRIS BRUMMER, *MINILATERALISM* (2014).

setting these standards, just as they do in comparable domestic policymaking.²⁷⁸

Second, international law has shifted from primarily governing interactions between states to also addressing states' treatment of their own citizens through human rights law. This is a significant change in the subject matter of international law. While international laws governing *intranational* affairs could also be seen as "foreign relations," they too are outside the realm of interactions between sovereign governments.²⁷⁹ Third, as Professor Jack Goldsmith has noted, "as the world becomes more interconnected, domestic law and activity increasingly have foreign consequences, and vice versa."²⁸⁰ In other words, the boundary problem between foreign and domestic affairs is a function not just of subject matter, but of consequences.²⁸¹ To be sure, boundary problems are pervasive in the law, and the existence of gray areas does not itself justify abandoning any attempt at making distinctions. But as a functional matter, there needs to be a strong justification for adopting the boundary in the first place. Increasingly, that justification seems unclear.

Finally, to the extent foreign and domestic relations do concern different subjects and relevant actors, it is not clear that those differences support exceptionalist doctrine. For example, deference to the executive might be premised upon the executive branch's interaction with foreign governments on topics of foreign affairs. As described above, there is no reason to conclude that this interaction with foreign sovereigns gives the executive branch greater expertise in foreign as opposed to domestic affairs. Even if it did, however, the diplomatic contact between executive branch officials and their foreign counterparts is in some contexts a reason for courts *not* to defer because deference would mean that State Department officials might be held responsible for negative decisions or that they are lobbied heavily by foreign governments — precisely the dynamic that led to the FSIA.²⁸²

As a second example, because of their different subjects and relevant actors, the executive branch might have a higher success rate in agenda setting and in legislative outcomes for foreign as opposed to

²⁷⁸ Goldsmith, *supra* note 273, at 1673.

²⁷⁹ For a discussion of this rise of human rights in the late twentieth century, see SAMUEL MOYN, *THE LAST UTOPIA* (2012).

²⁸⁰ See Goldsmith, *supra* note 273, at 1672.

²⁸¹ For a discussion of the boundary problem, see Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 *YALE L.J.* 1230, 1257–62 (2007).

²⁸² Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 *AM. J. INT'L L.* 601, 615 (2013); cf. John B. Bellinger III, *Ruling Burdens State Dept.*, *NAT'L L.J.*, June 28, 2010, at 47 (predicting that the result of the Supreme Court's 2010 decision in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), will be to subject the State Department "to intensive lobbying by both plaintiffs and defendants").

domestic affairs.²⁸³ If so, institutional competence analysis would argue that courts should defer *less* to the executive in foreign relations than in domestic cases.²⁸⁴ Anecdotal evidence suggests that Congress is both attentive to foreign relations issues and responsive to the executive. Congress legislates actively in the foreign relations context, for example by repeatedly updating the FSIA, making changes to sanctions legislation, and enacting annual Defense Department Authorizations. Even when it does not legislate, Congress frequently considers doing so, as the repeated hearings around the Authorization for Use of Military Force and National Security Agency demonstrated. Congress has also specifically corrected many judicial decisions in the foreign relations context, including decisions on the act of state doctrine, detentions, military commissions, and extraterritoriality.²⁸⁵ Empirical evidence also suggests that formalism may invite legislative correction,²⁸⁶ which could mean that text-based statutory interpretation without deference to the executive branch will have similar effects.

F. Uniformity

Another strong justification for foreign affairs exceptionalism is uniformity across the country. The idea here is simple: “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”²⁸⁷ Courts have generally understood that the Constitution allocates foreign relations powers to the national government and therefore, “at some point an exercise of state power that touches on foreign

²⁸³ See JON R. BOND & RICHARD FLEISHER, *THE PRESIDENT IN THE LEGISLATIVE ARENA* 152–75 (1990). Compare Aaron Wildavsky, *The Two Presidencies*, 4 *TRANS-ACTION* 7, 7–14 (1966), with Richard Fleisher et al., *The Demise of the Two Presidencies*, 28 *AM. POL. Q.* 3 (2000).

²⁸⁴ Cf. Jinks & Katyal, *supra* note 281, at 1254 (explaining that the risks of judicial error are asymmetric in foreign relations law because it is easier for Congress to correct an error against the President than an error in his favor); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 *MICH. L. REV.* 885, 886 (2003) (“A great deal turns as well on the attentiveness of the relevant legislature; the appropriate stance toward interpretation is not the same in a system with an attentive legislature as in a system with an inattentive one.”).

²⁸⁵ See Foreign Assistance Act of 1964 (Second Hickenlooper Amendment), Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2012)); see also *Boumediene v. Bush*, 553 U.S. 723, 733–36 (2008) (describing the congressional response to the Supreme Court’s detention-related cases); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 *B.U. L. REV.* 1 (2014) (describing the legislative response to the Court’s decisions on the extraterritorial application of statutes).

²⁸⁶ Adrian Vermeule, *Interpretive Choice*, 75 *N.Y.U. L. REV.* 74, 103 (2000) (describing empirical work that shows “decisions primarily based upon the ‘plain meaning’ of statutory text were more likely to be overridden than decisions primarily based upon statutory purpose or policy, or upon precedent”).

²⁸⁷ *THE FEDERALIST* NO. 42, *supra* note 253, at 260 (James Madison).

relations must yield to the National Government's policy."²⁸⁸ The worry is that state and local leaders might adopt parochial policies that individually, or through a patchwork of different policies, harm other states or the nation as a whole.²⁸⁹ Foreign relations exceptionalists reason from these uniformity concerns that power should be directed not only to the national government, but also to the President because only the President can "speak[] with one voice."²⁹⁰

The uniformity justifications are perhaps stronger than many of the others, but they too face difficulties. Consider economic policy. There might be substantial benefits to setting policies at the national level — to achieve uniformity in the basic elements of commercial transactions (currency, property, contract), facilitate transportation, and enable communication. Similarly, there are good arguments that states should not be allowed to prefer their own citizens to those of other states, as such "naked preferences" might impede the functioning of a national marketplace.²⁹¹ Indeed, foreign investment might even be more likely when there are uniform national economic policies, because uniformity reduces the regulatory and transaction costs for foreign firms. Despite the obvious benefits of uniformity, domestic law does not grant all power to the federal government. Rather, there is a large body of doctrine on federalism and preemption that governs the situations under which national uniformity or local differentiation operates. It is not obvious why the same level of sophistication, within the limits of formal constitutional constraints, cannot apply in foreign relations.

As to the further claim that the executive should have primacy because she alone can speak with one voice in foreign affairs, it is not clear why this functional value should trump competing separation of powers values.²⁹² Historically, the United States has never exclusively spoken with one voice, as the Constitution explicitly splits foreign affairs powers between Congress and the President. Indeed, Congress's expansive appropriations power alone places the executive's "one

²⁸⁸ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003); *see also* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

²⁸⁹ Goldsmith, *supra* note 273, at 1666.

²⁹⁰ *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., dissenting).

²⁹¹ For a discussion, *see* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

²⁹² Professor Daniel Abebe has recently argued that the one-voice presumption is problematic as between Congress and the President, and suggests that a better approach would be to have the one-voice idea vary based on the background international context. *See* Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233.

voice” claims in jeopardy; Congress can always prohibit expenditures of funds on specific foreign affairs policy aims.²⁹³

G. High Error Costs

One of the underlying themes in foreign relations exceptionalism is that judicial involvement in foreign affairs issues might have extremely high error costs. That is, there is a “fear that court decisions might have important and indeterminate international effects detrimental to the United States.”²⁹⁴ This is undoubtedly correct. Judicial decisions on foreign affairs could adversely affect the United States and its people. But judicial decisions on domestic affairs also have extremely high error costs, in some cases perhaps even higher error costs. Judges routinely decide issues that risk the safety, lives, and well-being of millions of Americans. Judges have determined the scope of peoples’ rights to physician-assisted suicide,²⁹⁵ abortion and contraception,²⁹⁶ and firearms.²⁹⁷ Judges evaluate agency actions designed to promote clean air,²⁹⁸ to restrict cigarette smoking,²⁹⁹ and to expand health care to tens of millions of people (including the poor).³⁰⁰ A “wrong” decision in any of these cases could literally cost the lives of millions of Americans. It is not clear why these decisions are perceived as more or less costly than those in foreign affairs, beyond some kind of psychological irrationality. This is of course not to say that error costs in foreign affairs could not be extremely high; they obviously could be. But error costs in domestic affairs could be just as high, or even higher, and it is not evident, therefore, why high error costs justify extreme judicial deference to the political branches in foreign affairs but not in domestic affairs.

H. The Statutory Foundations of Foreign Relations

A final challenge to foreign relations exceptionalism is the pervasive nature of statutes in the foreign affairs and national security arena. First, just as in domestic affairs, virtually every aspect of the executive branch’s conduct of foreign affairs and national security is undertaken pursuant to statutory authorities. Entire titles of the U.S. Code are devoted to aliens and nationality, armed forces, customs du-

²⁹³ See generally Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988); see also generally Moore, *supra* note 274.

²⁹⁴ Charney, *supra* note 240, at 811.

²⁹⁵ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²⁹⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

²⁹⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁹⁸ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

²⁹⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

³⁰⁰ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

ties, foreign relations, territories and insular possessions, and war and national defense.³⁰¹ These statutes cover everything from the organization of the Department of Defense,³⁰² to rules governing detainee treatment in the war on terror,³⁰³ to constraints on international aid and development.³⁰⁴

Second, and perhaps more importantly given the statutory nature of foreign affairs and national security: contrary to the conventional wisdom, the Administrative Procedure Act (APA) does not exempt “[a]ll foreign affairs matters” from its purview.³⁰⁵ In fact, the APA addresses the role of foreign and military issues in four different places. The exceptions to APA applicability are limited. The APA defines “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.”³⁰⁶ There is no blanket foreign affairs exception; rather, in the foreign affairs context, the APA exempts only “the governments of the territories or possessions of the United States,”³⁰⁷ “courts martial and military commissions,”³⁰⁸ and “military authority exercised in the field in time of war or in occupied territory.”³⁰⁹ Note the expansive breadth of the definition and the narrowness of the exceptions. In particular, the APA’s definition suggests clearly that military authority exercised outside of the field of battle *even during wartime* is not exempted from the statutory definition of agency.³¹⁰

The other exceptions are also limited. Section 552(b)(1) exempts from notice and publicity requirements and FOIA requests issues of “national defense or foreign policy” that are “specifically authorized

³⁰¹ Respectively, titles 8, 10, 19, 22, 48, and 50 of the U.S. Code.

³⁰² 10 U.S.C. § 111 (2012).

³⁰³ See, e.g., 42 U.S.C. §§ 200odd to 200odd-1 (2012).

³⁰⁴ See, e.g., United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. §§ 7601–7682 (2012).

³⁰⁵ Hathaway, *Presidential Power*, *supra* note 90, at 241–42 (emphasis added) (“All foreign affairs matters — including the process of making international law — were exempted from the Administrative Procedure Act”); see also *id.* at 221 (“The APA applies extensively to nearly every agency decision, but it expressly exempts foreign affairs.”).

³⁰⁶ 5 U.S.C. § 551(1) (2012).

³⁰⁷ *Id.* § 551(1)(C).

³⁰⁸ *Id.* § 551(1)(F).

³⁰⁹ *Id.* § 551(1)(G). The APA has no explicit exemption for the President, even though it expressly exempts Congress and the courts, see *id.* at § 551(1)(A), (B). The Supreme Court has, however, held twice that the President is not an agency. See *Dalton v. Specter*, 511 U.S. 462, 470 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

³¹⁰ Professor Kathryn Kovacs has argued that the phrases “in the field” and “time of war” should be interpreted more broadly because they were understood to be somewhat broader during the World War II era, when the APA was drafted. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 725 (2010). However, as Kovacs notes, the narrow interpretation appears to be finding favor with some courts. *Id.* at 720–25.

under criteria established by an Executive order to be kept secret . . . [and] are in fact properly classified pursuant to such Executive order.”³¹¹ Foreign affairs and military functions are exempted from notice-and-comment rulemaking procedures and formal adjudications,³¹² though the scope of these exemptions turns on the definition of a “military or foreign affairs” function.³¹³ As a matter of legislative history and the Attorney General’s contemporaneous manual on the APA, the military and foreign affairs exception should be construed narrowly,³¹⁴ but judicial interpretations of these terms have been “inconsistent,” largely depending instead on “the strength of government interests and how central foreign policy was to the administrative action”³¹⁵ (another manifestation of exceptionalism). As a practical matter, national security agencies have not even been consistently hostile to following notice-and-comment procedures. The Department of Defense, responding to recommendations from the Administrative Conference of the United States to remove the exception for rulemaking,³¹⁶ voluntarily adopted a policy of using notice-and-comment procedures for its regulations, barring a “significant and legitimate interest” of the public or the Department of Defense.³¹⁷ And importantly, foreign and national security affairs are not exempted at all from other APA requirements, such as § 706(2)(A)’s provision for arbitrary and capricious review, also known as hard look review.³¹⁸

* * *

In sum, foreign relations law may not actually be so different from ordinary domestic law and, when examined closely, most of the justifications for foreign relations exceptionalism are far weaker than is conventionally assumed. To anticipate an objection, it is possible that the

³¹¹ 5 U.S.C. § 552(b)(1)(A)–(B).

³¹² *Id.* § 553(a)(1) (rulemaking); *id.* § 554(a)(4) (adjudications). Note that military justice issues, such as courts martial and military commissions, are addressed under a different statutory scheme — the Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2012). For a discussion of the notice-and-comment exception and an argument that it should be reformed, see Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883 (2014).

³¹³ For a discussion of this issue, see Vermeule, *supra* note 39, at 1112–13.

³¹⁴ See *id.* at 1112 & n.62 (citing S. REP. NO. 79-752, at 13 (1945), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944–46, at 185, 199 (1946)); U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26–27, 45 (1947).

³¹⁵ Vermeule, *supra* note 39, at 1112.

³¹⁶ Elimination of the “Military or Foreign Affairs Function” Exemption from APA Rulemaking Requirements, 39 Fed. Reg. 4847 (Feb. 7, 1974); see also Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-making Under the APA*, 71 MICH. L. REV. 221, 225 (1972).

³¹⁷ 32 C.F.R. § 336.3(b) (2002) (repealed); see Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 GREEN BAG 2D 379, 386 n.43 (2003).

³¹⁸ See Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 516–17 (2014).

foreign-versus-domestic framework could be a proxy or heuristic for how an evaluation of considerations of speed, expertise, and the like would shake out if assessed in many cases over an extended period of time. That is, as a matter of easy administrability, a clear rule, though over- and under-inclusive, might be superior to greater particularity in the analysis. Perhaps. But we think that argument is weak given the extensive similarities between the categories and the wildly over- and under-inclusive nature of the categories. In an era of increasing normalization, we think exceptionalism's adherents need to show that exceptionalism is *on net* superior to the normal domestic system governed by separation of powers, federalism, and administrative law — or that harmonizing the foreign and domestic is appropriate, but should be done along the exceptionalist baseline rather than the domestic law baseline. It is not at all clear why courts cannot readily apply the normal domestic approach and take functional justifications on a case-by-case basis, rather than at an abstract and high level of generality. Given the trend toward normalization and the weak justifications for exceptionalism, we simply do not fear the alignment of foreign affairs to the domestic baseline. In the next Part, we describe how normalization can be further extended.

IV. THE UNFINISHED BUSINESS OF NORMALIZATION

Although the Supreme Court's efforts at normalization have covered the central issues in foreign relations law, normalization has not yet made it to the full universe of foreign relations cases and issues. These areas represent the unfinished business of normalization. In this Part, we canvass a number of illustrative areas and debates in foreign relations law and show how normalization would apply to them. Our aim here is not to be exhaustive across all areas of foreign relations law; rather, we have chosen areas that tackle important issues with cross-cutting relevance and that show how normalization can apply to Congress, courts, and scholars.

A few clarifications. First, our argument is not that the outcome of every exceptionalist case should have gone the other way (though we have a few in mind that probably should have), but rather that the *reasoning* behind such decisions is problematic. In particular, as described below, we expect that normalization will lead the executive to provide more thorough justifications for its actions (and in many cases, provide a justification for the first time). These shifts are independently significant, even if some of the normalized cases would come out the same way. Second, note that many of these issues operate in the lower courts and at the subconstitutional level. The three waves of normalization have largely (though not completely) taken place at the constitutional level and have been driven by the Supreme Court. Much of the

future of normalization will be statutory and much of the work of normalization will be in application by the lower courts.

A. *Eliminating Outliers*

In a few stray cases, the Court has retained exceptionalism, though it is not obvious from the cases how much turned on the exceptionalist framing. In light of the broader trend toward normalization, we think these cases are outliers. In the future, the Court should ignore the exceptionalism in these cases and instead continue with the normalization project.

First, in *Clapper v. Amnesty International USA*³¹⁹ the Court suggested that standing might be more difficult to establish in certain kinds of foreign relations cases,³²⁰ though it does not seem to have relied much on this fact. In that case, journalists and lawyers challenged the Foreign Intelligence Surveillance Amendments Act as a violation of their First Amendment rights. Justice Alito, writing for a five-Justice majority, reasoned that standing requirements should be carefully observed when “the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.”³²¹ Although the briefing provided both constitutional and functional justifications for this proposition,³²² the opinion itself did not explain why standing requirements should be more stringent in foreign relations cases. In fact, Justice Alito’s suggestion that foreign relations cases might receive special consideration appeared to be of little significance to the decision. The cases he cited were resolved on standard imminence-of-harm reasoning, with no mention of unique national security or foreign affairs considerations,³²³ and the four dissenting Justices gave national security and foreign affairs reasoning no mention at all.

³¹⁹ 133 S. Ct. 1138 (2013).

³²⁰ See *id.* at 1147.

³²¹ *Id.*

³²² See, e.g., Reply Brief for the Petitioners at 11, *Clapper*, 133 S. Ct. 1138 (No. 11-1025), 2012 WL 5078759 (warning that finding the respondents had standing would “improperly require those courts to speculate about national-security decisions that Executive officials might make in the discharge of Article II responsibilities, without the information, expertise, or sometimes competing responsibilities of the Executive officials who make those decisions”); see also Brief of John D. Ashcroft et al. as Amici Curiae in Support of Petitioners at 11, *Clapper*, 133 S. Ct. 1138 (No. 11-1025), 2012 WL 3186579 (arguing that strict standing requirements are “vital to the national security context, where broad challenges have a uniquely dangerous potential to expose sensitive information and undermine efforts to secure the peace”).

³²³ See *Clapper*, 133 S. Ct. at 1147 (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–22 (1974); *United States v. Richardson*, 418 U.S. 166, 176–80 (1974); *Laird v. Tatum*, 408 U.S. 1, 11–16 (1972)). For another recent example, see *Kaplan v. Central Bank of the Islamic Republic of Iran*, 961 F. Supp. 2d 185, 193 (D.D.C. 2013).

The second outlier was a statutory preemption case. In *Arizona v. United States*,³²⁴ Justice Kennedy emphasized federal control over immigration in general, and the foreign relations consequences of removal decisions in particular. Decisions “of this nature touch on foreign relations and must be made with one voice,”³²⁵ and the “dynamic nature of relations with other countries” requires “the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy with respect to these and other realities.”³²⁶ In another closely divided high-profile immigration-preemption case decided just one term earlier, none of the opinions had invoked exceptionalist language, suggesting that foreign affairs federalism had become normalized.³²⁷ Thus, the impact of Justice Kennedy’s exceptionalist language in *Arizona* on the outcome of the case is difficult to evaluate, a task further complicated by the Court’s unclear preemption analysis — “a sea of shifting frameworks and inconsistent decisions.”³²⁸ Not surprisingly, commentators see *Arizona* as a case of exceptionalism arising out of the domestic politics of immigration, not as a function of its relationship to foreign affairs,³²⁹ while others view it as another example of the Court’s generally muddled preemption case law.³³⁰ Only time will tell whether immigration exceptionalism will fade as foreign affairs law becomes normalized, but the Court’s language in *Arizona* appears out of step with the Court’s recent foreign relations decisions and relies on the weak basis on which exceptionalism has always rested.

B. Normalizing Separation of Powers: The *Youngstown Two-Step*

The Supreme Court’s seminal 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer*³³¹ both undercut and perpetuated foreign affairs exceptionalism. To the extent the opinion has generated exceptionalist

³²⁴ 132 S. Ct. 2492 (2012).

³²⁵ *Id.* at 2506–07.

³²⁶ *Id.* at 2499.

³²⁷ See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); Young, *supra* note 180, at 340.

³²⁸ Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 3 (2013); cf. Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 603 (2013) (noting that there is “no clear link between [Justice Kennedy’s national sovereignty] analysis and the preemption holding”).

³²⁹ See, e.g., Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 57 (attributing the outcome in *Arizona* not to the foreign relations–related aspects of the case but instead to what “[w]e might describe . . . as a gap between *formal* deportability and *normative* deportability — a gap that is similar, perhaps, to the gap that Bill Stuntz and others believe exists in some parts of criminal law”); see also Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1248 (2014) (analyzing *Arizona* as one of many examples of the role of inaction in federalism).

³³⁰ Meltzer, *supra* note 328, at 10–14.

³³¹ 343 U.S. 579 (1952).

reasoning, we think it should be normalized. In one sense, the opinion did normalize foreign relations law by rejecting both Justice Sutherland's theory of extraconstitutional authority in foreign relations³³² and his dicta about extreme deference to the President. Not only did the Court reach the merits of the case, but it also invalidated President Truman's wartime seizure of steel mills in Ohio.³³³ The President justified his actions based on military necessity and on his constitutional powers in foreign relations.³³⁴ Rejecting these arguments, the Justices reasoned that the President's authority must come from the Constitution or an act of Congress — not from extraconstitutional sources.³³⁵

The *Youngstown* case did not mark an end to exceptionalism, however. Indeed, it has served as an occasionally unrecognized and certainly unnecessary source of exceptionalism. The most influential opinion in the case was Justice Jackson's concurrence setting out his famous tripartite framework in which the executive branch's actions are categorized according to whether they are authorized by Congress, prohibited by Congress, or neither.³³⁶ Applying that framework, the Court has sometimes read congressional enactments broadly to favor the executive branch in foreign relations cases — more broadly than it reads statutes outside the foreign relations context.³³⁷ Justice Jackson's concurrence also interpreted the scope of the Commander in Chief Clause in part by distinguishing between foreign and domestic actions by the President.³³⁸ This distinction is necessary for, but not unique to, exceptionalism.

Another exceptionalist aspect of *Youngstown* is that by collapsing constitutional and statutory interpretation into one framework, the case appeared to put foreign relations in a special category, distinct from the other work of administrative agencies. Although *Youngstown* is not limited to foreign affairs cases,³³⁹ this is the area in which its influence has been greatest. As *Chevron* and *Skidmore* came to define the deference generally due to administrative agencies in statutory interpretation, the foreign affairs-related work of the State and Defense Departments in particular was treated differently than domes-

³³² Note, however, that Justice Sutherland's theory need not be rooted in exceptionalism. If text and history revealed an extraconstitutional power baseline to be valid, then the theory would be built on normal, not exceptional, foundations.

³³³ See *Youngstown*, 343 U.S. at 589.

³³⁴ See *id.* at 587.

³³⁵ *Id.* at 585.

³³⁶ See *id.* at 635–38 (Jackson, J., concurring).

³³⁷ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981); see also KOH, *supra* note 86, at 138–40.

³³⁸ See *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (suggesting that “the widest latitude” should be given to the commander-in-chief power “when turned against the outside world for the security of our society,” but not “when it is turned inward”).

³³⁹ See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

tic agency decisions. This was partly because the Administrative Procedure Act exempts much of their work from certain statutory requirements,³⁴⁰ so that *Chevron* itself applies less often. But foreign relations cases simply ignored the possibility of *Skidmore* deference or other principles that generally apply to judicial review of agency decisionmaking.

Finally, while Justice Jackson's framework has been discussed widely and celebrated (almost) universally,³⁴¹ there still remains confusion about the categories' importance, scope, and application, especially as a matter of constitutional interpretation. For example, some take the opinion to symbolize congressional power in foreign affairs and seem to think that it "foreclose[s] claims of implied presidential power in foreign affairs."³⁴² Others hold that the opinion furthers expansive executive power claims, including the "sole organ" thesis, but without the baggage of Justice Sutherland's extraconstitutional theory.³⁴³ Some criticize the pragmatism of Justice Jackson's opinion³⁴⁴ as leaving little room for originalism.³⁴⁵ Others have argued that the categories are not

³⁴⁰ See, e.g., 5 U.S.C. § 553(a)(1) (2012).

³⁴¹ "Almost" because prominent contemporaries criticized Jackson's opinion. See, e.g., Edward S. Corwin, Comment, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 63 (1953) ("Justice Jackson's rather desultory opinion contains little that is of direct pertinence to the constitutional issue."). At least one modern commentator has criticized its merits, though without challenging its symbolic import. See Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 104–05 (2002).

³⁴² Bellia, *supra* note 341, at 91 (recounting this view). On congressional authority, see, for example, Jules Lobel, Comment, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1410 (1989) (noting that "advocates of congressional authority look to *Youngstown* [...] as the basis for imposing limits on executive authority"); and Adam J. White, *Justice Jackson's Draft Opinions in The Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1122 (2006) (considering it "obvious" that "Jackson's *Youngstown* opinion has long been favored by proponents of congressional authority").

³⁴³ Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 698 (1998) ("*Youngstown* also advanced the proposition that the President is the sole organ of foreign relations, by clearing away the doctrinal debris from Sutherland's extra-constitutional thesis without disturbing the central holding. By removing the taint of Sutherland's twisted logic, *Youngstown* preserved the core concept of *Curtiss-Wright*. Since *Youngstown*, courts have reiterated that the President is the sole organ of foreign relations, but rather than relying upon Sutherland's historiography, courts have justified this conclusion by reference to the geopolitical necessities of the Cold War.")

³⁴⁴ On functionalism in Justice Jackson's opinion, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522–31 & nn.55, 59 (1991) (describing formal and functional approaches and using Justice Black's and Justice Jackson's opinions, respectively, as examples); Cohen, *supra* note 29 (manuscript at 23–24) ("[O]ne might date the birth of foreign affairs functionalism to 1952 and Jackson's influential *Youngstown* concurrence."); and William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 23–24 (1998) (highlighting the formalist reasoning of Justice Black's opinion and the functionalist strains in the concurrences and arguing that *Youngstown* indicates that formalism and functionalism "are frequently and maybe typically interconnected").

³⁴⁵ Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 172 (2004) (highlighting *Youngstown* as "among the most anti-originalist

even a “framework for evaluating executive action.”³⁴⁶ And there remains confusion about the roles that congressional inaction and acquiescence play in Justice Jackson’s framework,³⁴⁷ largely due to the interplay between *Youngstown* and *Dames & Moore*.³⁴⁸

Youngstown can, however, be normalized and clarified by applying ordinary principles of administrative law, statutory interpretation, and constitutional law. A number of scholars have argued that Justice Jackson’s *Youngstown* opinion does not identify how to determine in which category to place a presidential action,³⁴⁹ but this determination is merely a question of statutory interpretation.³⁵⁰ The first question under *Youngstown* is whether a statute authorizes the executive action at issue, either expressly or impliedly. This is not an extraordinary question, unique to foreign relations law and raising profound constitutional concerns. Rather, it is an ordinary statutory interpretation question, in which there are frequently debates that turn on text, congressional intent, purpose, and the like. In the domestic context, cases abound: Does the word “harm” in the Endangered Species Act autho-

opinions in the modern canon”); Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown’s Shadow*, 53 ST. LOUIS U. L.J. 29, 31 (2008).

³⁴⁶ Bellia, *supra* note 341, at 91.

³⁴⁷ See Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 226–27 (2002) (arguing that Justice Jackson’s category 2 is a second-order rule of decision that enables inferences about congressional inaction if traditional interpretive tools like text, structure, and original history do not yield a result); Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 327 (2010) (noting that “[a]ttributing categorical significance to congressional action (or inaction) — beyond assessing whether Congress has authorized or prohibited the executive branch activity — effectively substitutes judicial for congressional judgment”).

³⁴⁸ See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1988).

³⁴⁹ See, e.g., Bellia, *supra* note 341, at 133 (“[I]f the very issue in dispute is what Congress intended to delegate to the Executive, a court cannot simply presuppose that Congress intended its delegation to be interpreted narrowly based solely on Justice Jackson’s rhetorical choices.”); Stack, *Statutory President*, *supra* note 41, at 558 (“Justice Jackson’s opinion is silent on the question of how to judge whether a presidential act fits within the scope of an express or implied statutory authorization.”); Vermeule, *supra* note 39, at 1141–42 (“In a world of multiple and very vague statutory delegations bearing on national security, foreign relations, and emergency powers, judges have a great deal of freedom — not infinite freedom, of course — to assign *Youngstown* categories to support the decisions they want to reach, rather than reach decisions based on the *Youngstown* categories.”).

³⁵⁰ See, e.g., Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347, 355 (2013) (“As *Youngstown* illustrates, however, an important prior question will often involve the interpretation of a statute.”); Koh, *supra* note 348, at 1310–13 (discussing the importance of statutory interpretation in *Dames & Moore* and subsequent cases); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1927–28 (2012) (observing separation of powers parallels between *Youngstown* and *Chevron*); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 29 (“While Justice Jackson concluded that the President lacked authority to seize the steel industry, he did not specify the appropriate background principle in the face of statutory ambiguity.”).

alize the executive to consider habitat destruction or modification as triggering protection for endangered species?³⁵¹ Does the statute allowing the FCC to “modify any requirement” of certain tariffs allow the agency to get rid of tariffs altogether?³⁵² The answers to questions of this sort might be fiercely contested (as they indeed were in those two particular cases), but that changes nothing about the analysis. They are simply run-of-the-mill statutory interpretation questions — and they should not be blurred with the constitutional questions.³⁵³

Thus, the issue of an “implied” authorization or prohibition is no different than it would be in administrative law. Just as *Mead*, *Skidmore*, and *Chevron* govern implied authorizations in domestic law cases, so too in foreign relations cases. The court can determine whether Congress has spoken clearly on the issue at hand, or whether the statutory text is ambiguous — and it can grant the appropriate level of deference to executive interpretations of ambiguous language. Familiar subsidiary doctrines in administrative law, such as the “major questions doctrine,” which holds that Congress would not intend to give agencies authority over “major questions” without specific authorization,³⁵⁴ would apply as well. The implied authorization problem is, on this reading, no different than the parallel issue in ordinary administrative law cases.

On this normalized reading, Justice Jackson’s categories should be interpreted as seeking to address the constitutional question, not the statutory question, despite the fact that each category involves the interplay of Congress and the President. In light of ordinary statutory interpretation principles, consider the three categories again. If, at *Youngstown* “step one,” the court finds that the executive’s action is authorized by the statute, then we move to the constitutional question: does the federal government have the constitutional power to undertake the action? At the other extreme, if the court finds at step one that Congress has forbidden the particular action,³⁵⁵ then the constitutional question is whether the President has Article II powers that are preclusive. In the middle, of course, are cases where, at step one, the court finds there is simply no statutory guidance; we will come back to that momentarily.

Starting with statutory interpretation and then moving to constitutional analysis clarifies the *Youngstown* framework and also shows that

³⁵¹ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 691 (1995).

³⁵² *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 221 (1994) (quoting 47 U.S.C. § 203(b) (1988)) (internal quotation marks omitted).

³⁵³ See Stack, *Statutory President*, *supra* note 41, at 575–79.

³⁵⁴ See Sunstein, *supra* note 232, at 240–42 (discussing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

³⁵⁵ In the domestic context, think *Brown & Williamson*, 529 U.S. 120.

it is not necessarily exceptionalist. Take the debate about whether the *Youngstown* approach is pro-congressional or pro-executive power. The analysis within Justice Jackson's framework is neither. At the statutory level, the interpretation of the provision should be handled like other questions of statutory interpretation that involve executive power. At the constitutional level, the framework is likewise agnostic. As a formal matter, Justice Jackson's categories take no position on theories of constitutional interpretation. Within the *Youngstown* framework Justices could decide, for example, the scope of a preclusive Article II power based on *any* kind of methodology. Some might prefer originalism; others will look to historical practice. But again, there is not necessarily anything exceptionalist about this — unless a different method of interpretation is selected because the case is categorized as one related to foreign affairs.

Now consider category 2, which seems to be the source of the most confusion. It is worth quoting in its entirety:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.³⁵⁶

First, as to the interpretive methodology point, although Justice Jackson might be read as suggesting that “congressional inertia, indifference or quiescence” are part of constitutional interpretation, he does not actually commit to a particular methodology. Rather, he speaks here from the *external* point of view,³⁵⁷ describing how cases might come out “as a practical matter.” Indeed, his footnote to this paragraph references Lincoln's habeas decision and notes the Court's differing views during and after the Civil War.³⁵⁸ Even in category 2 then, as a formal matter, any methodological approach could be ap-

³⁵⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

³⁵⁷ By external point of view, we do not mean to get into jurisprudential debates, particularly those swirling around the meaning of the internal point of view in H.L.A. HART, *THE CONCEPT OF LAW* 89 (2d ed. 1994). Rather, we use this phrase in a social science sense: Justice Jackson's category 2 seeks to explain the real world, not operate within a professional practice. For discussions of the jurisprudential and sociological elements, see Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157 (2006); and Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a “Practice” in Legal Theory and Sociological Studies*, 30 *LAW & SOC'Y REV.* 163 (1996).

³⁵⁸ See *Youngstown*, 343 U.S. at 637 n.3 (Jackson, J., concurring).

plied. Foreign relations generally, and *Youngstown* specifically, do not require following historical practice, originalism, or anything else.

Second, category 2's reference to "congressional inertia, indifference or quiescence," along with category 3's reference to the "implied will of Congress,"³⁵⁹ has led to debate about the role of congressional inaction.³⁶⁰ As a matter of ordinary statutory interpretation, there is an ongoing debate about legislative inaction, or pre- and post-enactment legislative history (as it is sometimes called).³⁶¹ Reliance upon legislative inaction will simply depend on one's preferred approach to statutory interpretation; under the normalization approach, the fact that foreign relations are involved should have nothing to do with it. Similarly, within constitutional debate, the inferences drawn from legislative inaction are simply a matter of the preferred method of constitutional interpretation. For those who like to look at historical practice, it might be relevant, just as it would be in a domestic separation of powers case.³⁶² For those who prefer originalism, it would not be relevant — again, just as in a domestic separation of powers case.³⁶³

This normalized approach also clarifies where the most prominent exceptionalist *Youngstown* case, *Dames & Moore*, goes wrong. The case has been criticized for too readily inferring congressional authorization from legislative silence.³⁶⁴ We do not take a position on this question, but argue instead that the opinion went wrong by blurring the lines between statutory and constitutional interpretation. Indeed, the Court did not even clearly assign the case to one of the three *Youngstown* categories. On the normalized theory of *Youngstown*, *Dames & Moore*'s reasoning is problematic. As a matter of ordinary statutory interpretation, the Court had three avenues open to it. First, it could have read the International Emergency Economic Powers Act³⁶⁵ (IEEPA) and the Hostage Act³⁶⁶ to authorize the President's action, putting the case in category 1. Second, the Court could have found that the statutes did not authorize the action, putting the case in category 3. Third, it could have put the case in category 2. After these statutory determinations, then the Court would have resolved the appropriate constitutional question, depending on the category. In categories 2 and 3, the Court must resolve an Article II question; regular

³⁵⁹ *Id.* at 637.

³⁶⁰ Swaine, *supra* note 347, for example, says that the "implied will" language "asks about nonstatutory activity, including congressional inaction." *Id.* at 293.

³⁶¹ See CALEB NELSON, STATUTORY INTERPRETATION 364–65 (2011); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

³⁶² See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

³⁶³ See, e.g., *id.* at 2592 (Scalia, J., concurring in the judgment).

³⁶⁴ See KOH, *supra* note 86, at 138–40.

³⁶⁵ 50 U.S.C. §§ 1701–1707 (2012).

³⁶⁶ 22 U.S.C. § 1732 (2012).

constitutional interpretation methods should have applied. The Court would ask whether the President had power independent of or shared with Congress, or for category 3, whether he had preclusive power. Congressional practice — the implicit approval of claim settlement historically — could be relevant for either of these inquiries, but only if a historical gloss³⁶⁷ normally informs the constitutional question. The Court did not take any of these three approaches. Instead, it blurred the statutory and constitutional questions by claiming that the IEEPA and other statutes at once did not authorize the President's action but nonetheless indicated a "general" congressional intent to authorize such actions.³⁶⁸ A normal approach to statutory and constitutional interpretation would have made the decision more persuasive, whichever way the Court ultimately decided.

C. Deference to the Executive Branch

The deference that courts should afford to executive branch interpretations of statutes, treaties, and executive agreements is a core but unsettled issue in foreign relations law. This analysis too would benefit from normalization, as would the question of deference afforded to factual determinations related to foreign relations. With respect to statutory interpretation, unless *Chevron* formally applies, it is unclear what deference courts should give to the executive branch and whether that deference is different for case-specific issues as opposed to general interpretive questions.³⁶⁹ For treaty interpretation, courts ostensibly give "great weight" to the views of the executive branch — except that sometimes they do not, and it is unclear why "great weight" should be afforded at all.³⁷⁰ Finally, the executive branch often makes factual determinations of one kind or another, such as a determination about the risks of a particular foreign policy decision — for example, the likelihood that detainees transferred to Iraqi prisons will be tortured.³⁷¹ Sometimes the Court defers, but in other cases it does not.

In recent years, the scholarly debate over the level of deference to give the executive branch in foreign relations has turned toward importing "ordinary" administrative law principles into foreign relations law.³⁷² We welcome the analogy, but we do not think it has been tak-

³⁶⁷ See generally Bradley & Morrison, *supra* note 35.

³⁶⁸ *Dames & Moore v. Regan*, 453 U.S. 654, 678–82, 686 (1981).

³⁶⁹ See Wuerth, *supra* note 282, at 614.

³⁷⁰ See *infra* pp. 1968–70.

³⁷¹ *Munaf v. Geren*, 553 U.S. 674, 702–03 (2008).

³⁷² See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Hathaway, *Presidential Power*, *supra* note 90; Jinks & Katyal, *supra* note 281; Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011); Posner & Sunstein, *supra* note 33; Sitaraman, *supra* note 318; Sunstein, *supra*

en far enough. Scholars writing in this vein have hesitated to normalize foreign relations deference wholeheartedly. On a normalization approach, standard administrative law doctrines and principles would apply to foreign relations issues across the board.³⁷³ Doing so would push an executive desiring deference to provide sound reasons for its decisions.³⁷⁴

1. *Statutory Interpretation.* — Normalizing deference to the executive branch involves adopting administrative law's deference doctrines on their own terms. The black-letter rules are well known. Under *Mead*,³⁷⁵ when an agency has been delegated authority and exercises that authority to interpret the statute, and that interpretation has the force of law, then the interpretation is eligible for *Chevron* deference.³⁷⁶ Per *Chevron*'s familiar two-step process, the Court first asks whether the statute speaks to the precise issue clearly, and if not, the Court then defers to an agency's reasonable interpretation of the statute.³⁷⁷

When the agency's interpretation does not have the force of law, it is eligible for *Skidmore*³⁷⁸ deference.³⁷⁹ Under *Skidmore*, the Court retains interpretive power, but grants weight to the executive's interpretation — not because of the statutory authority of the agency, but because of the agency's comparative institutional competence.³⁸⁰ As Justice Jackson (notably, the author of the *Youngstown* categories) wrote, the views of the agency:

[C]onstitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earli-

note 137; Evan Criddle, Comment, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927 (2003).

³⁷³ Note that there are some distinctions as a matter of generally applicable interpretation. For example, the APA exempts foreign affairs rulemaking from notice-and-comment procedures. 5 U.S.C. § 553(a)(1) (2012). Normalization does not mean ignoring the statutory distinction, but it also does not suggest adding to it.

³⁷⁴ Cf. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 530 (2006) (discussing the substitutability of "textual plausibility and procedural formality of agency interpretive decisions").

³⁷⁵ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

³⁷⁶ *Id.* at 226–27. For those who would normalize presidential power vis-à-vis agencies, the critical issue might turn just on whether the President's action has the force of law, not on the delegation question that is common in the traditional administrative law context. See Stack, *Statutory President*, *supra* note 41, at 597 (arguing that the President should get *Chevron* deference as long as his action is binding).

³⁷⁷ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

³⁷⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

³⁷⁹ *Mead*, 533 U.S. at 243–45.

³⁸⁰ See Peter L. Strauss, Essay, "*Deference*" Is Too Confusing — Let's Call Them "*Chevron Space*" and "*Skidmore Weight*," 112 COLUM. L. REV. 1143, 1145–46 (2012).

er and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.³⁸¹

Between the decisions in *Skidmore* and *Mead*, the Court expanded on these persuasive factors, and scholars have distilled them down to five doctrinal elements: “thoroughness, formality, validity, consistency, and agency expertise.”³⁸² Courts, based on evidence from empirical studies, seem to evaluate these factors on a case-by-case basis, granting a sliding scale of *Skidmore* deference, as warranted.³⁸³

Foreign relations law includes a variety of areas in which the executive branch has interpretive opinions but in which an administrative action is not at issue, such as the interpretation of the FSIA or the Alien Tort Statute.³⁸⁴ Under the standard administrative law approach, situations like these (an agency interpretation without an agency action) would not technically receive *Skidmore* deference. But it turns out that it is not unique to foreign relations for the executive branch to have opinions about statutory interpretation in cases between private parties. In bankruptcy cases and ERISA cases, for example, the Supreme Court frequently requests amicus briefs from the Solicitor General, inquiring into the position of the government on statutory meaning, even though the cases might not involve government action. In these cases, the Court grants what Professor William Eskridge and Lauren Baer have called “consultative deference,”³⁸⁵ which they argue is effectively the same as *Skidmore* deference.³⁸⁶

We agree with that characterization and while we recognize the two situations are technically different, we think it makes sense functionally not to distinguish between *Skidmore* on the one hand and consultative deference on the other and instead to simply characterize both as *Skidmore* deference. Thus, *Skidmore* would apply in both the classic situation (such as *Mead*) where the agency is delegated lawmaking authority but has not exercised it through notice-and-comment rulemaking (that is, it has not given its interpretation the force of law) and in the currently doctrinally distinct situations in which the agency has not been delegated authority at all.³⁸⁷ Although there may be significant differences in the expertise the agency has to offer, that dis-

³⁸¹ *Skidmore*, 323 U.S. at 140.

³⁸² Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1259 (2007). Hickman and Krueger note that “longevity and contemporaneity” might together comprise an important sixth factor. *Id.*

³⁸³ *See id.*

³⁸⁴ Posner and Sunstein use these examples. *See* Posner & Sunstein, *supra* note 33, at 1180.

³⁸⁵ Eskridge & Baer, *supra* note 251, at 1111.

³⁸⁶ *Id.* at 1113.

³⁸⁷ We distinguish here between when the agency exercises the authority and when the President exercises the authority, and bracket the question of what the President’s constitutional powers are in such cases. *See supra* note 41.

tion is captured in the *Skidmore* analysis itself, in which the amount of deference depends in part on the expertise of the agency on the particular issue in question. This combined approach is better than maintaining the two categories because it is unclear how the two categories are different as a functional matter, and because *Skidmore* captures the relevant considerations by focusing the courts on the institutional competence advantage that an agency may (or may not) have.³⁸⁸

Moreover, our approach is consistent with the Court's recent cases in an important way: the third wave of normalization has clearly rejected the "*Chevronizing*" approach to many statutory interpretation questions in foreign relations cases.³⁸⁹ In light of these recent cases, what sort of deference is executive branch statutory interpretation due? If not *Skidmore*, then presumably it is due merely "consultative deference." But to the extent there is a difference between *Skidmore* and consultative deference, the latter undervalues the potential expertise that an agency may bring to a foreign relations-related issue, even in contexts in which *Skidmore* has not traditionally applied, such as the interpretation of the Alien Tort Statute or treaty interpretation. One might attempt to have a variety of deference regimes short of *Chevron* with treaties in one category, consultative deference in another, *Skidmore* in another, and fact-based deference in perhaps another. All involve slightly different factors that speak for or against deference. We think it preferable, however, to acknowledge that the same set of overarching concerns about expertise, accountability, and adequacy of executive branch process are at work in all of these examples, and we agree with Eskridge and Baer that simplification is not only preferable but also readily doable.³⁹⁰ Finally, even as a matter of doctrine, current case law does not foreclose the application of *Skidmore* to this broader category of cases.

Other scholars have suggested using an administrative law approach to deference in foreign relations cases, but their proposals remain exceptionalist. Although Professor Bradley was the first to argue directly for the use of *Chevron* in foreign relations cases,³⁹¹ his approach was not to apply *Chevron* directly but instead to use a "*Chevron* perspective,"³⁹² in which the deference doctrine would apply not

³⁸⁸ For a discussion of how courts have implemented *Skidmore* by reviewing the various factors in the test, see Hickman & Krueger, *supra* note 382.

³⁸⁹ See Ingrid Wuerth, *Chief Justice Roberts: De-Chevronizing U.S. Foreign Relations Law*, LAWFARE (May 16, 2014, 8:35 AM), <http://www.lawfareblog.com/2014/05/chief-justice-roberts-de-chevronizing-u-s-foreign-relations-law> [<http://perma.cc/4UZU-XGP2>].

³⁹⁰ See Eskridge & Baer, *supra* note 251, at 1183–89.

³⁹¹ See generally Bradley, *supra* note 372.

³⁹² *Id.* at 651.

just according to its own terms, but analogously to other situations as well. This led him, for example, to suggest that *Chevron* should apply to treaty interpretation (a conclusion with which we, along with some other commentators,³⁹³ disagree).

Professors Eric Posner and Cass Sunstein have likewise applied a *Chevron* approach to foreign relations questions, though they take deference further than Bradley. Posner and Sunstein would apply *Chevron* more broadly in foreign than domestic affairs — classic exceptionalism. Based on the comparative institutional competence arguments that we reject above, they advocate applying *Chevron* in foreign relations cases even when the executive branch is not exercising lawmaking authority and would not otherwise be entitled to such deferential review.³⁹⁴ While we agree with their methodological focus, that analysis points toward normalization, not exceptionalism. Accordingly, for the reasons described above,³⁹⁵ rather than apply *Chevron* beyond its terms in administrative law, the better approach is to apply standard *Skidmore* deference. Professors Derek Jinks and Neal Katyal criticized Posner and Sunstein's approach, but they too fail to advocate normalization. Rather, they argue that in the "executive-constraining zone," which includes doctrines designed to restrict executive power, that deference should be restricted.³⁹⁶ In addition, they suggest that *Chevron* should not apply in the absence of formal procedures that incorporate the bureaucracy into decisionmaking.³⁹⁷ It is not obvious, however, why courts should apply either of these new tests in foreign relations cases instead of simply applying standard administrative law doctrines.

Although we think that normalization via black-letter administrative law doctrines is possible, we harbor no illusions about the clarity of administrative law in theory or practice. Scholars and judges have long debated the desirability of virtually every administrative law doctrine, and empirical studies have shown that courts are hardly consistent in applying administrative law doctrines.³⁹⁸ Indeed, one scholar has argued that problems with *Chevron* in administrative law suggest that foreign relations should look elsewhere, to fundamental questions about courts' institutional role.³⁹⁹

³⁹³ See Criddle, *supra* note 372, at 1930.

³⁹⁴ See Posner & Sunstein, *supra* note 33, at 1205–07.

³⁹⁵ See *supra* pp. 1937–38.

³⁹⁶ See Jinks & Katyal, *supra* note 281, at 1235.

³⁹⁷ See *id.* at 1279.

³⁹⁸ See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Eskridge & Baer, *supra* note 251; Hickman & Krueger, *supra* note 382; Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

³⁹⁹ Pearlstein, *supra* note 372, at 786–91.

Still, we think these challenges are inapposite. First, contestation itself is not an argument against normalization. Virtually every area of law features deep disagreements among scholars or judges about doctrinal choices. That fact alone does not justify adopting a different legal regime — which will have its own conflicts as well. Second, and more importantly, the debates within administrative law doctrines have nothing to do with the foreign versus domestic divide. Rather, they cut to the heart of legal principles: the scope of delegation, the importance of expertise, the sufficiency of process and reasoning, and the relationship between *Chevron* and canons of interpretation. These questions apply equally to foreign and domestic issues, as do the answers. Our point is not that administrative law is clearer, simpler, or less debated than foreign relations law — but rather that answers should not rely on foreign relations exceptionalism. Normalizing deference means applying the same set of rules and principles in foreign and domestic affairs, unless there are particular formal or specific functional differences on the issue at hand. Declarations of blanket exceptionalism should no longer be a justification for divergent treatment.

With our approach set out, we turn now to two additional issues: the relationship between deference and presumptions, and the interpretation of congressional enactments such as the Authorization for Use of Military Force. Commentators have written extensively about whether *Chevron* deference trumps various presumptions in both foreign relations and domestic law. While Bradley, Posner and Sunstein, and Jinks and Katyal all come to different conclusions on this issue, they all share a common approach: they consider the question only with respect to foreign relations issues.⁴⁰⁰ Normalization suggests that the appropriate question is whether these canons and presumptions (or more precisely, each particular one) should triumph over *Chevron* or *Skidmore* generally. While there are debates about this question,⁴⁰¹ one's favored approach should apply with respect to both foreign and domestic affairs.

Consider a few examples. The presumption against extraterritoriality is sometimes defended on the grounds that it steers foreign policy issues (but not domestic issues) away from courts and toward the political branches, which are especially well-suited to resolve them, in part because of the possibility of international discord.⁴⁰² The presumption

⁴⁰⁰ Sunstein might be an exception to this trend in his other work. See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

⁴⁰¹ For the general contours of the debates, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008). For a recent analysis of the presumption against extraterritoriality, see Clopton, *supra* note 285.

⁴⁰² See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (“The presumption against extraterritoriality guards against our courts triggering . . . serious foreign policy conse-

also rests on the claim that Congress generally legislates with domestic rather than extraterritorial application in mind.⁴⁰³ The *Charming Betsy* canon (which requires that, where possible, one interpret statutes so they do not violate international law)⁴⁰⁴ might be defended as allowing the political branches to make decisions on questions of foreign policy, because they have particular expertise in that area and because judicial expertise is weaker in foreign than domestic issues.⁴⁰⁵ But the *Charming Betsy* canon is also based on legislative intent; it shares a common foundation with the presumption against implied repeal and the constitutional avoidance canon.⁴⁰⁶ In other words, both presumptions can be justified on exceptionalist grounds — that the executive is simply “better” and “knows more” about actions abroad and international law. To the extent one believes that this is the justification for the presumptions, one might believe that *Chevron* or perhaps *Skidmore* should trump the presumptions. But we find these justifications for the presumptions relatively weak, both because of their high level of generality and because of the existence of non-exceptionalist justifications: formally, congressional intent, and functionally, the preference for simple decision rules. The formal justification would suggest that the presumptions trump *deference*, while the non-exceptionalist functional justifications could go either way. Our point here is not to wade into the debate itself on the merits, but just to stress that normalization suggests excising exceptionalist reasoning and relying only on non-exceptionalist justifications.

Commentators have also written extensively on the interpretation of the 2001 Authorization for Use of Military Force⁴⁰⁷ (AUMF).⁴⁰⁸ Cass Sunstein argues that the AUMF is best read as a grant by Con-

quences, and instead defers such decisions, quite appropriately, to the political branches.”); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (“For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.”).

⁴⁰³ See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 90 (1998) (“[O]nly the notion that Congress generally legislates with domestic concerns in mind is a legitimate basis for the presumption against extraterritoriality.”).

⁴⁰⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 & n.1 (1987).

⁴⁰⁵ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 525 (1998) (“The functional considerations [supporting the canon] include the political branches’ advantages vis-à-vis the courts in obtaining foreign affairs information and in responding to changing world conditions.”).

⁴⁰⁶ See *id.* at 529–33; Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 331–32 (2005).

⁴⁰⁷ Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

⁴⁰⁸ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

gress to the President of lawmaking authority and that *Chevron* deference therefore applies to executive interpretations of ambiguous AUMF terms.⁴⁰⁹ Jinks and Katyal, concerned with executive branch self-dealing, have argued that *Chevron* should not apply when a provision is meant to constrain the executive.⁴¹⁰ We take a different view. The normalization thesis suggests that whatever one's domestic theory of *Chevron*, it should apply to the AUMF as it does to any other congressional enactment. Thus, while it is true that the AUMF does not include the explicit delegated rulemaking or adjudicatory power, one might believe there is another "indication of a comparable congressional intent"⁴¹¹ that justifies applying *Chevron* (as Sunstein does⁴¹²). But, while we formally agree with Sunstein on this point, we disagree with his apparent further suggestion that *Chevron* would apply even in the absence of an interpretation that does not meet *Mead*'s test.⁴¹³ In cases where *Mead* is not satisfied, normalization would require only *Skidmore* deference. Jinks and Katyal have a harder case, as their argument relies on the "executive-constraining zone," which they appear to root exclusively in foreign relations law.⁴¹⁴ The normalization thesis would suggest that they would have to apply the executive-constraining theory to domestic affairs as well. The concerns that Jinks and Katyal raise are, however, reflected to some extent in the *Skidmore* standard itself, which considers the quality of the process used to make the agency decision and also indicia of self-dealing (which can be analogized to agency litigating positions or other signs of compromised decisionmaking).

2. *Fact Deference.* — Foreign relations cases often involve judicial review of factual determinations made by the executive branch or by the legislature.⁴¹⁵ In this context, too, normalization is not complete. Consider two recent examples. The Court has accepted the government's assessment that Iraqi prisons did not pose a serious prospect of torture⁴¹⁶ and that it is not possible to distinguish between a foreign terrorist group's violent and nonviolent activities.⁴¹⁷ In both cases, the Court emphasized the broad overall scope and significance of judicial review, consistent with the normalization thesis, but also employed exceptionalist reasoning when presented with questions of fact. Moreover, in one case the Court repeatedly noted that it was deferring to

⁴⁰⁹ See Sunstein, *supra* note 137, at 2663–64.

⁴¹⁰ See Jinks & Katyal, *supra* note 281, at 1236–45.

⁴¹¹ *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

⁴¹² See Sunstein, *supra* note 137, at 2665–67.

⁴¹³ See *id.* at 2665–66.

⁴¹⁴ See Jinks & Katyal, *supra* note 281, at 1236–44.

⁴¹⁵ See Chesney, *supra* note 119, at 1366.

⁴¹⁶ *Munaf v. Geren*, 553 U.S. 674, 702–03 (2008).

⁴¹⁷ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

the judgment of both Congress and the executive, not the executive branch alone.⁴¹⁸ The opinions are thus both normalized and exceptionalist. Nevertheless, we join other commentators who have suggested or explicitly argued that the Court erred in these two cases by employing exceptionalist reasoning. Professor Aziz Huq maintains that cases on counterterrorism should “become just another part of the ordinary business of the federal courts”⁴¹⁹ and that judges in these cases “need to pay the same attention to factual predicates and specific details about policies as they do in cases involving campaign finance, affirmative action, or telecommunications policy.”⁴²⁰ Professor Robert Chesney has comprehensively evaluated what he calls “national security fact deference” and similarly concluded that the optimal resolution of deference questions is “deeply dependent on context.”⁴²¹ Contrary to both authors, however, we do not limit our analysis to counterterrorism or national security, but instead see the courts’ treatment of facts in these cases as one piece of a broader picture of foreign affairs exceptionalism and the incomplete process of normalization.⁴²²

Normalizing judicial review of executive factfinding still involves determining what factors courts should consider or what standard courts should employ. For facts determined during a formal adjudicatory process, courts review factfinding under a “substantial evidence” test in ordinary administrative law,⁴²³ but this standard is not always applicable because foreign affairs functions are exempted from formal adjudicatory process requirements.⁴²⁴ However, facts can also be evaluated under the arbitrary and capricious review provision of APA § 706(2)(A)⁴²⁵ and the Supreme Court’s decision in *State Farm*.⁴²⁶ Indeed, a number of commentators have shown that courts do apply arbitrary and capricious review in a variety of national security cases, and they have argued for wider application of the standard.⁴²⁷ In

⁴¹⁸ See *id.* (“[E]valuation of facts by the Executive, like Congress’s assessment, is entitled to deference.”).

⁴¹⁹ Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 949 (2012).

⁴²⁰ *Id.* at 947.

⁴²¹ Chesney, *supra* note 119, at 1435.

⁴²² For a general discussion of these issues, see Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1199–212 (2009) (arguing that the President’s claims of statutory power are subject to a version of ultra vires review).

⁴²³ 5 U.S.C. § 706(2)(E) (2012). For examples in the context of national security law, see Vermeule, *supra* note 39, at 1121–22.

⁴²⁴ See 5 U.S.C. § 554(a)(4).

⁴²⁵ See *id.* § 706(2)(A).

⁴²⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁴²⁷ For a discussion of direct application, see Vermeule, *supra* note 39, at 1119–21. For arguments that the standard be expanded, see generally Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583 (2011) (arguing against expanded deference to the military); Masur, *supra* note 137; and Sitaraman, *supra* note 318. It is worth noting that applying these

some cases — for example, on the battlefield — administrative law standards will not apply.⁴²⁸ Yet we do not believe this justifies exceptionalist reasoning. Rather, courts should still seek to assess facts as they would in analogous domestic situations.

To see how this might work, let us revisit *Munaf v. Geren*.⁴²⁹ Munaf argued that he would be tortured if transferred to Iraqi custody.⁴³⁰ The Court relied on exceptionalist reasoning to conclude that “[t]he Judiciary is not suited to second-guess [the] determinations” of the State Department.⁴³¹ But it is not clear why the Court could not have evaluated State’s claim. The State Department could have presented an argument why it believed it was likely that the persons transferred to Iraqi custody would not be tortured, and the Court could have assessed whether State considered all the evidence and made a rational connection between the evidence and their ultimate conclusion. Indeed, courts normally engage in this kind of analysis when the government alleges that an entity supports terrorism.⁴³² It is not clear why the determination that a foreign country engages in torture is so different in kind from these cases that judicial review is impossible.⁴³³

Similarly, consider the analysis in *Holder v. Humanitarian Law Project*.⁴³⁴ In assessing the strength of the government’s interest in the material-support-for-terrorism statute, the Court considered whether political advocacy activities were effectively fungible, enabling terrorist activities.⁴³⁵ Congressional intent and factfinding partly answered the question, but the Court also gave deference to facts claimed in an affidavit submitted by the State Department, largely accepting them

standards to factfinding would not impose additional procedures on the executive branch. Under *Vermont Yankee*, courts are prohibited from doing so. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). It is also worth clarifying that we mean to disaggregate constitutional questions from this debate. Some factfinding may be assigned exclusively to the President as a constitutional matter — such as determining who is the head of a particular foreign state. And outside the administrative law context, there are situations in which the executive branch may be acting pursuant to some mixture of delegated power and Article II power. In the war on terror, for example, the extent to which the President’s power is based on the Constitution or instead on the AUMF is deeply contested.

⁴²⁸ The APA exempts military authority exercised on the battlefield. See 5 U.S.C. § 551(1)(G).

⁴²⁹ 553 U.S. 674 (2008).

⁴³⁰ *Id.* at 700.

⁴³¹ *Id.* at 702.

⁴³² See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162–64 (D.C. Cir. 2003).

⁴³³ Indeed, this is precisely why other scholars have also suggested that fact deference need not be treated so exceptionally. See, e.g., Chesney, *supra* note 119; Huq, *supra* note 419; Masur, *supra* note 137.

⁴³⁴ 130 S. Ct. 2705 (2010).

⁴³⁵ *Id.* at 2725–27.

without any scrutiny.⁴³⁶ In dissent, Justice Breyer argued that the government had not “explain[ed] in any detail how the plaintiffs’ political-advocacy-related activities might actually be ‘fungible’ and therefore capable of being diverted to terrorist use.”⁴³⁷ The different treatment of the State Department’s affidavit by the majority and dissent in *Holder* indicates how an arbitrariness review standard could help eliminate exceptionalism. Instead of simply deferring to executive factfinding for exceptionalist reasons, the Court could have, as Justice Breyer hints, required the State Department to actually explain the connection between the facts and the conclusion it drew. On this theory, the government would have had to do more than just submit an affidavit; it would actually have had to explain why its position made sense, consider the alternatives, and address counterarguments. Humanitarian Law Project might still have lost, but the government could not simply declare something a fact and then claim “national security” to gain deference for that claim’s validity.

3. *Treaties and Executive Agreements.* — Courts have generally given executive branch interpretations of treaties “great weight,”⁴³⁸ but their reasons for doing so have varied. Normalizing the interpretation of treaties and executive agreements would, we argue, provide a clearer basis for deference. The Supreme Court’s treaty interpretation decisions in the last decade have been divided, with deference granted to executive branch interpretations in some cases but not in others. For example, the Court explicitly relied on the executive branch’s interpretation in *Sanchez-Llamas v. Oregon*,⁴³⁹ *Abbott v. Abbott*,⁴⁴⁰ and in part in *Medellín*.⁴⁴¹ Chief Justice Roberts emphasized in *Sanchez-Llamas* that, “[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”⁴⁴² This rea-

⁴³⁶ *Id.* at 2727. The Court noted that it had engaged in this same practice in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). *Holder*, 130 S. Ct. at 2727.

⁴³⁷ *Holder*, 130 S. Ct. at 2735 (Breyer, J., dissenting).

⁴³⁸ See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). The Court has normalized treaty interpretation in other ways as well. For example, in *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014), the Court interpreted the relevant treaty as if it were an “ordinary contract between private parties.” *Id.* at 1206.

⁴³⁹ 548 U.S. 331, 355 (2006).

⁴⁴⁰ 130 S. Ct. 1983, 1993 (2010).

⁴⁴¹ See *Medellín v. Texas*, 552 U.S. 491, 513, 525–26 (2008) (affording “great weight” to the executive branch’s interpretation on the question of treaty self-execution, *id.* at 513 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (internal quotation mark omitted), but not deferring to its argument that “the relevant treaties give the President the authority to implement the *Avena* judgment,” *id.* at 525).

⁴⁴² 548 U.S. at 355 (alteration in original) (quoting *Kolovrat*, 366 U.S. at 194) (internal quotation marks omitted); see also *Abbott*, 130 S. Ct. at 1993 (“It is well settled that the Executive Branch’s interpretation of a treaty ‘is entitled to great weight.’” (quoting *Sumitomo*, 457 U.S. at 185)). See generally Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty*

soning might suggest a constitutional basis for deferring, or it could mean simply that the government offers expertise and accountability that the courts do not, making deference appropriate. Justice Kennedy focused on the expertise-based rationale in *Abbott*, emphasizing that “[t]he Executive is well informed concerning the diplomatic consequences resulting from this Court’s interpretation of ‘rights of custody,’ including the likely reaction of other contracting states and the impact on the State Department’s ability to reclaim children abducted from this country.”⁴⁴³ The constitutional rationale was expressed by Judge Randolph of the D.C. Circuit in his opinion in *Hamdan v. Rumsfeld*⁴⁴⁴ (which then-Judge Roberts joined): “Under the Constitution, the President ‘has a degree of independent authority to act’ in foreign affairs, and, for this reason and others, his construction and application of treaty provisions is entitled to ‘great weight.’”⁴⁴⁵

The normalization thesis readily supplies a framework for analysis. If standard constitutional interpretation would afford a greater role for the executive in treaty interpretation than in statutory interpretation, deference would be warranted. But the constitutional argument has been assumed in foreign relations cases, rather than proven — the reasoning in *Sanchez-Llamas* and *Hamdan* above provide examples. For instance, assuming that the President has some independent authority to act in foreign relations, a constitutionally based argument would presumably have to identify the specific authority to act and then provide a theory as to why that authority bears on treaty interpretation, which is otherwise committed to the courts under Article III. Constitutional arguments aside, treaties and other international agreements should be treated as ordinary law. Those that delegate authority, and in which the executive acts pursuant to that authority, would get *Chevron* deference, and executive interpretation absent such authority would be eligible for *Skidmore* deference.⁴⁴⁶ Deference to the executive in treaty cases based on an expertise justification would be accounted for under *Skidmore*’s deference test. Normalization does not ignore legitimate functional concerns, but it also does not treat them as *sui generis* — nor does it bolster them with underdeveloped constitutional justifications.

Normalization also helps make sense of the Court’s refusal to defer to the executive branch on treaty interpretation questions in *Hamdan*

Interpretations, 92 IOWA L. REV. 1723 (2007) (chronicling the history of judicial deference to executive branch treaty interpretations).

⁴⁴³ *Abbott*, 130 S. Ct. at 1993.

⁴⁴⁴ 415 F.3d 33 (D.C. Cir. 2005).

⁴⁴⁵ *Id.* (citations omitted) (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003); and *United States v. Stuart*, 489 U.S. 353, 369 (1989)).

⁴⁴⁶ See Criddle, *supra* note 372, at 1933–34.

and *Medellín*, where it ignored the “great weight” language from other cases. Commentators argue that the two lines of cases are at odds.⁴⁴⁷ But one possible distinction is that the Court does not afford the same deference to the executive branch when the construction of the treaty is dispositive with respect to an assertion of the executive branch’s own authority.⁴⁴⁸ *Sanchez-Llamas* involved no direct exercise of executive power.⁴⁴⁹ But in the relevant part of *Medellín*, the executive relied upon the treaty as a basis for its asserted authority to compel Texas to comply with the ICJ’s *Avena* judgment.⁴⁵⁰ In *Hamdan*, interpretation of the treaty was dispositive as to the executive branch’s statutory authority to use military commissions.⁴⁵¹ As discussed above, the intuitive problem of self-dealing provides reason to be skeptical of executive interpretations in this context, in the same way that litigating positions are viewed negatively in the *Chevron* context; *Skidmore* deference is flexible enough to accommodate this consideration.

D. *International Delegation as Normal Delegation*

The early twentieth-century transformation of U.S. foreign relations law began in earnest with a delegation case.⁴⁵² Today the courts have largely normalized delegation doctrine, although some scholars argue in favor of exceptionalism, especially when international organizations or agreements are involved. We argue that standard administrative and constitutional law principles adequately address these concerns.⁴⁵³

Standard separation of powers doctrine prohibits Congress from delegating legislative power to private entities⁴⁵⁴ and from delegating

⁴⁴⁷ See, e.g., Chesney, *supra* note 442, at 1732–33.

⁴⁴⁸ Note the parallel to *City of Arlington v. FCC*. See *supra* pp. 1934–35.

⁴⁴⁹ See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006).

⁴⁵⁰ See *Medellín v. Texas*, 552 U.S. 491, 503 (2008); see also *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 72 (Mar. 31).

⁴⁵¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006). Only Justices Scalia and Thomas thought that the executive branch should receive deference on the treaty interpretation question, based on the President’s authority as Commander in Chief and chief executive of the United States, supported in part with a citation to *Curtiss-Wright*. See *id.* at 719 (Thomas, J., dissenting). Justice Thomas also argued that under the Court’s precedents, “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.” *Id.* at 718 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)) (internal quotation marks omitted). The majority accepted neither argument.

⁴⁵² See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936). The year before, the Court had struck down domestic legislation because it delegated too much lawmaking discretion to the President. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

⁴⁵³ For a welfarist argument that international delegation should be treated as normal delegation, see Note, *International Delegation as Ordinary Delegation*, 125 HARV. L. REV. 1042 (2012).

⁴⁵⁴ See, e.g., *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015); see also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

to the executive branch without an “intelligible principle” set out in the statute itself.⁴⁵⁵ In contemporary practice, courts rarely find a violation of either axiom in foreign relations cases or in domestic cases.⁴⁵⁶ Courts continue to suggest, however, that the second principle applies with less force in foreign relations cases, based on both functional reasoning and constitutional analysis. The constitutional argument, which is not necessarily exceptionalist, is that broader congressional delegations are permissible when the President is also exercising independent constitutional authority.⁴⁵⁷ The functionalist argument is, however, exceptionalist: “[B]ecause of the changeable and explosive nature of contemporary international relations” and the executive’s speed and access to information, “Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas.”⁴⁵⁸ This reasoning is invoked most often in statutory interpretation, as discussed above,⁴⁵⁹ but it is also used to justify the relaxation of constitutional nondelegation principles. The clearest contemporary example is the Court’s 1996 decision *Loving v. United States*⁴⁶⁰ in which the Court rejected a nondelegation challenge to the President’s prescription of aggravating factors used to impose the death penalty in a court-martial proceeding.⁴⁶¹ Even in *Loving*, however, exceptionalism took a back seat to standard delegation principles, causing Justice Thomas to write separately. His concurrence, joined by no other Justice, argued that the decision should be based entirely on the exceptional nature of military affairs, without reliance on domestic separation of powers issues.⁴⁶² Today, the functional foundations for this argument have been

(striking down a statute that required coal producers to accept the maximum hours and wages negotiated by a group of producers and mine workers).

⁴⁵⁵ See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406–07 (1928); *Field v. Clark*, 143 U.S. 649, 692–94 (1892).

⁴⁵⁶ See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–76 (2001); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131–33 (1980).

⁴⁵⁷ See, e.g., *Loving v. United States*, 517 U.S. 748, 772–73 (1996); *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975); cf. Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 *YALE L.J.* 2280, 2290–91 (2006) (arguing that the President has a transsubstantive power to complete statutory schemes). Lower courts tend to mix constitutional and exceptionalist reasoning. See, e.g., *United States v. Chi Tong Kuok*, 671 F.3d 931, 938–39 (9th Cir. 2012).

⁴⁵⁸ *Haig v. Agee*, 453 U.S. 280, 292 (1981) (alteration in original) (emphasis omitted) (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)) (internal quotation marks omitted).

⁴⁵⁹ See, e.g., *id.*; *Zemel*, 381 U.S. at 17.

⁴⁶⁰ 517 U.S. 748.

⁴⁶¹ *Id.* at 758.

⁴⁶² *Id.* at 777–78 (Thomas, J., concurring in the judgment) (“There is abundant authority for according Congress and the President sufficient deference in the regulation of military affairs to uphold the delegation here, and I see no need to resort to our nonmilitary separation-of-powers and ‘delegation doctrine’ cases in reaching this conclusion.”).

undercut by the Court's overall rejection of foreign affairs exceptionalism.

Other standard separation of powers principles also apply to delegations of foreign affairs-related authority. For example, there are limits on the power of administrative agencies to "subdelegate" their authority.⁴⁶³ Due process, the Appointments Clause, and Article II limitations are also relevant to both domestic and international delegations.⁴⁶⁴ Finally, as Curtis Bradley has argued, most delegations related to international law and international organizations do not involve the power to make or interpret law that is binding within the U.S. legal system, which diminishes the accountability and democracy-based concerns associated with delegations.⁴⁶⁵ Where there is uncertainty about the scope of intended delegation, courts generally assume that the actions of international organizations and tribunals are not judicially enforceable in U.S. courts,⁴⁶⁶ a principle that is consistent with the Court's general approach of interpreting statutes to avoid delegation problems.⁴⁶⁷

Despite the trend toward normalization in the doctrine, academic arguments for delegation-related foreign affairs exceptionalism are common, especially in the contexts of international decisionmaking and international organizations. Some argue that these kinds of delegations should be held to a more relaxed standard than domestic delegations, based on the old exceptionalist reasoning that foreign relations issues require greater speed and flexibility.⁴⁶⁸ Others maintain that the accountability and democracy-based arguments against delegations apply with particular force when power is delegated to international organizations, perhaps warranting *greater* scrutiny from the courts — exceptionalism in the other direction.⁴⁶⁹ The case for exceptionalism — in either direction — seems exaggerated, however. The courts' some-

⁴⁶³ See *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 925–28 (D.C. Cir. 2008); David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 84–87 (2013).

⁴⁶⁴ See generally CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2013) (exploring the intersection of international and domestic law).

⁴⁶⁵ *Id.*

⁴⁶⁶ See *id.* at 134–64; see also *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 10 (D.C. Cir. 2006) ("We need not confront the 'serious likelihood that the statute will be held unconstitutional.' It is far more plausible to interpret the Clean Air Act and Montreal Protocol as creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties." (citations omitted) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998))).

⁴⁶⁷ See *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Sunstein, *supra* note 232, at 244–47.

⁴⁶⁸ See Galbraith & Zaring, *supra* note 33, at 770–73.

⁴⁶⁹ See Edward T. Swaine, *Resisting International Delegations*, 98 AM. SOC'Y INT'L L. PROC. 343 (2004).

what narrow interpretation of delegations to international organizations (along with constitutional limitations including the prohibition on delegations to private entities) has effectively avoided many of the democracy and accountability problems that might arguably arise otherwise.⁴⁷⁰ But interpreting delegations narrowly leads to the concern that courts are overenforcing constitutional norms through avoidance⁴⁷¹ — a concern that arguably imposes increasing costs on policy-making as administrative agencies attempt to coordinate with their counterparts through soft-law agreements.⁴⁷²

Professors Jean Galbraith and David Zaring have argued that foreign affairs exceptionalism should be applied to delegations that involve “soft” or nonbinding international agreements, so that “America’s regulators . . . [can] be permitted to continue working with their foreign counterparts.”⁴⁷³ In support, the authors argue that the Clean Diamond Trade Act (CDTA) and U.S. participation in the Internet Corporation for Assigned Names and Numbers (ICANN) are restricted by standard nondelegation doctrine, demonstrating the need for an exceptionalist approach.⁴⁷⁴ But these examples appear largely unproblematic under standard doctrine. ICANN, for example, is said by some to pose private-entity delegation issues,⁴⁷⁵ but other scholars disagree.⁴⁷⁶ Even those advancing the argument admit its weaknesses, especially in light of the generally relaxed approach courts have taken to post–New Deal delegations.⁴⁷⁷ Most tellingly, perhaps, no court has accepted this argument in the decade and a half since it was first advanced. The CDTA allows the President to waive its provisions in the interest of national security and it also includes a trigger based on actions by international organizations, interpreted by the President as a grant of discretion to him.⁴⁷⁸ But waivers and triggers are common features of domestic legislation and it is unclear that standard delegation principles would invalidate them.⁴⁷⁹

⁴⁷⁰ See BRADLEY, *supra* note 464, at 136–37.

⁴⁷¹ See Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

⁴⁷² See, e.g., Galbraith & Zaring, *supra* note 33, at 754–55.

⁴⁷³ *Id.* at 741.

⁴⁷⁴ *Id.* at 778–84 (arguing that courts should use an exceptionalist approach to evaluate delegation issues raised by the CDTA and ICANN).

⁴⁷⁵ See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20 (2000).

⁴⁷⁶ See, e.g., Edward Brunet, *Defending Commerce’s Contract Delegation of Power to ICANN*, 6 J. SMALL & EMERGING BUS. L. 1 (2002).

⁴⁷⁷ See Kathleen E. Fuller, *An Interview with Michael Froomkin*, 2001 DUKE L. & TECH. REV. 0001, ¶ 12, <http://scholarship.law.duke.edu/dltr/vol11/iss1/2> [<http://perma.cc/SBQ9-GZWR>].

⁴⁷⁸ Edward Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1519–20, 1610 (2004).

⁴⁷⁹ See Barron & Rakoff, *supra* note 141, at 312–24.

More fundamentally, to the extent that standard nondelegation doctrine might invalidate some aspect of the effort to implement soft law, it is because the standard concerns associated with delegation — accountability and democracy — apply in the foreign affairs context as well.⁴⁸⁰ Galbraith and Zaring offer no real argument for soft-law exceptionalism except that agencies need flexibility. Their concrete examples do not show that current regulatory efforts are stymied by traditional doctrine, however, and they offer little to support the claim that agencies need more discretion in foreign relations than domestic cases.

E. Normalizing Foreign Official Immunity and State Secrets

In some areas, normalization would be best furthered by Congress passing legislation explicitly delegating rulemaking authority to an executive agency, or short of that, by the agency promulgating rules even in the absence of a new congressional enactment. Perhaps the best examples are foreign official immunity determinations and the state secrets doctrine. Although these two areas of law are rarely considered together, they have structural similarities. Both are judicially created doctrines, both are partially based on contested exceptionalist and constitutional grounds, both may be invoked in litigation between private parties in which no other agency action is at issue, and both are controversial.

Consider immunity first. Determinations of foreign state immunity were traditionally made by courts applying international law. But as part of the early twentieth-century transformation in foreign relations law, the Supreme Court held with little analysis that courts are bound by executive determinations of immunity.⁴⁸¹ If the State Department made no such determination, courts were bound to follow whatever general immunity principles the executive branch had developed. This system did not work well. It led to unwanted pressure on the State Department from foreign sovereigns, to the perception that the Department made immunity decisions based on political rather than legal grounds, to a lack of certainty as to the substance of the law, and to concerns about the due process rights of the parties because the State Department had no formal procedure for deciding immunity claims.⁴⁸²

⁴⁸⁰ Compare Louis L. Jaffe, *An Essay on the Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 359–60 (1947), with Swaine, *supra* note 469.

⁴⁸¹ See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–35 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 588–89 (1943); see also Wuerth, *supra* note 91, at 924–26.

⁴⁸² Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1144–45 (2011); see also Michael H. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608, 613–14 (1954).

As a result, at the request of the State Department, the FSIA was enacted and courts were again tasked with making immunity determinations,⁴⁸³ now pursuant to statutory criteria.

But in recent years, State Department immunity determinations have returned. In 2010, the Supreme Court held that the FSIA does not govern the immunity of individual foreign officials.⁴⁸⁴ Today, the State Department claims the power to make foreign official immunity determinations that are binding on courts, based on early twentieth-century cases against foreign sovereigns and on broad, exceptionalist reasoning.⁴⁸⁵ The State Department makes contemporary immunity determinations in the form of either “suggestions of immunity”⁴⁸⁶ or “statements of interest.”⁴⁸⁷ The suggestions and statements are both legal and factual, in the sense that they state what the executive branch believes the law is or should be and that they determine whether an individual qualifies for immunity under those legal principles. Lower courts have struggled to determine what deference, if any, is due to these executive branch submissions.⁴⁸⁸ While the twentieth-century cases and exceptionalist arguments for executive power may be unconvincing, the executive branch nevertheless has expertise and information that is obviously relevant to immunity determinations.

Normalization helps resolve this issue. Although we are skeptical about the constitutional arguments,⁴⁸⁹ if generally applicable constitutional analysis accords the President the power to make immunity determinations binding on the courts,⁴⁹⁰ then when such determinations are made they must be binding, assuming they are not otherwise unconstitutional or contrary to law.⁴⁹¹ If the President lacks this power, however, Congress could authorize the State Department to engage in rulemaking to establish generally applicable principles for individual official immunity determinations and even an adjudicatory process to apply the facts to these situations.

Congress has a variety of options for setting standards. Congress could simply set out substantive immunity law by statute, as it has done for foreign sovereigns. But given the unsettled state of the inter-

⁴⁸³ See 28 U.S.C. § 1602 (2012).

⁴⁸⁴ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010).

⁴⁸⁵ Wuerth, *supra* note 91, at 918 & n.9, 934 & n.114.

⁴⁸⁶ See John B. Bellinger III, *The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities*, 44 VAND. J. TRANSNAT'L L. 819, 829 (2011).

⁴⁸⁷ *Id.* at 831.

⁴⁸⁸ See, e.g., *Yousuf v. Samantar*, 699 F.3d 763, 768–73 (4th Cir. 2012).

⁴⁸⁹ See Wuerth, *supra* note 91, at 931–35 (reviewing and analyzing constitutional arguments).

⁴⁹⁰ This might include congressional authorization or acquiescence. See *id.* at 939–42.

⁴⁹¹ Several lower courts have held that foreign sovereigns do not have due process rights. See, e.g., *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96–97 (D.C. Cir. 2002).

national law of immunity and the important effect that U.S. law and policy can have on the formation of international law, Congress might instead give the agency the power to develop substantive rules of immunity. While this is an unconventional suggestion in the ongoing debate over sovereign immunity, it is natural from the normalization perspective. Congress would require the State Department to issue regulations governing individual official immunity determinations. This regime could follow the standard notice-and-comment processes in § 553 of the APA — or it could modify, or even exclude, those requirements. If Congress took this approach, then the agency would get *Chevron* deference concerning any relevant questions of statutory interpretation, and its substantive immunity provisions would be subject to arbitrary and capricious review.⁴⁹² These immunity rules would then bind the courts as they made case-by-case immunity decisions.⁴⁹³ In court, the State Department's factual determinations would be subject to arbitrary and capricious review (unless Article II's recognition power were at issue) and its interpretative suggestions would be given *Chevron* or *Skidmore* deference depending on whether its interpretation was promulgated as a rule with the force of law.⁴⁹⁴

Congress could also give the State Department the power to initially adjudicate immunity cases. Congress could require formal agency adjudication, for example,⁴⁹⁵ which would involve a formal, adversarial hearing, as it does in administrative law.⁴⁹⁶ To be sure, this approach would impose significant costs on the State Department and reintroduce the problem of pressure on the State Department from aggrieved foreign governments. In addition, under a grant of authority from Congress, the State Department could also engage in informal adjudications of foreign official immunity, which would result in an order and would be reviewed to ensure the order was not arbitrary or capricious.⁴⁹⁷ There is some precedent for informal agency determina-

⁴⁹² See 5 U.S.C. § 706(2)(A) (2012).

⁴⁹³ See *id.* § 551(4) (“[R]ule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .”).

⁴⁹⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

⁴⁹⁵ See 5 U.S.C. § 554.

⁴⁹⁶ See, e.g., *id.* § 556.

⁴⁹⁷ Under the APA, an “adjudication” means an “agency process for the formulation of an order,” *id.* § 551(7), and an “order” means “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing,” *id.* § 551(6). The latter definition could include immunity determinations, assuming there is not a requirement for formal adjudication procedures pursuant to §§ 556 and 557. Informal adjudications are subject to arbitrary and capricious review. *Id.* § 706(2)(A).

tions along these lines from the pre-FSIA days,⁴⁹⁸ although they were understood as binding on the courts as a constitutional matter.

This course of action would improve decisionmaking about foreign official immunity in several ways. First, immunity determinations are currently governed by federal common law, with an ill-defined deference to the executive. Rulemaking would standardize the applicable law and process available within the State Department, heading off claims of differential treatment based on political factors, in turn diminishing the political pressure on the State Department. Second, it would clarify the deference to which agency determinations are entitled. Third, it would take advantage of the considerable expertise of the State Department with respect to immunity, while at the same time allowing courts to oversee the decisionmaking to ensure that the agency considered the relevant evidence and did not act arbitrarily. Finally, it would afford substantial deference to agency determinations. As in other contexts, agencies may choose more extensive procedures in order to receive more deference from reviewing courts.⁴⁹⁹

The state secrets privilege could likewise be improved along similar lines. The privilege is a common law evidentiary procedure that allows the government to withhold evidence that, if disclosed, would threaten national security.⁵⁰⁰ It has been invoked recently in a series of high-profile post-9/11 cases challenging the conduct of the U.S. government; the government has also invoked the privilege in private litigation.⁵⁰¹ The Supreme Court has emphasized the evidentiary nature of the privilege, rather than basing the privilege on constitutional or exceptionalist grounds.⁵⁰² Lower courts, however, have applied the doctrine broadly at the request of the Bush and Obama Administrations, dismissing entire cases based in part on foreign affairs exceptionalism.⁵⁰³ These uses of the privilege have generated much

⁴⁹⁸ Under pre-FSIA practice, both the plaintiff and the foreign government could submit memoranda on the immunity issue, and either party could request a conference before a panel of State Department attorneys. These conferences did not include the taking of evidence or testimony and no transcripts were made. Bellinger III, *supra* note 486, at 832 & n.80.

⁴⁹⁹ See Stephenson, *supra* note 374, at 552–53.

⁵⁰⁰ See *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953).

⁵⁰¹ See U.S. DEP'T OF JUSTICE, STATE SECRETS PRIVILEGE REPORT (2011), <http://fas.org/sgp/jud/statesec/doj-ssp.pdf> [<http://perma.cc/3M8A-MK2L>].

⁵⁰² See *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1905–06 (2011) (emphasizing with respect to *Reynolds* that “[f]ederal discovery rules, then as now, did not require production of documents protected by an evidentiary privilege,” *id.* at 1905, and that “[*Reynolds*] decided a purely evidentiary dispute by applying evidentiary rules,” *id.* at 1906); *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007). *But see Reynolds*, 345 U.S. at 6 n.9 (explaining that the executive’s “power to suppress documents is based . . . [on] an inherent executive power which is protected in the constitutional system”).

⁵⁰³ See, e.g., *El-Masri v. United States*, 479 F.3d 296, 303–11 (4th Cir. 2007); cf. Memorandum from Alberto R. Gonzales, Att’y Gen., U.S. Dep’t of Justice, to Senator William H. Frist, Majority Leader, U.S. Senate, Legal Authorities Supporting the Activities of the National Security

criticism and are sometimes analogized to the political question doctrine.⁵⁰⁴

Efforts to reform the privilege should be understood as attempts to normalize it. Proposals before Congress have sought, for example, to amend the Federal Rules of Evidence to provide both substantive and procedural limitations on the privilege. Government affidavits standing alone would provide insufficient basis for granting the privilege; courts would instead be required to examine the underlying evidence in camera. The review of evidence in camera is similar to the process mandated by the Classified Intelligence Procedures Act,⁵⁰⁵ as are other elements of the proposed legislation.⁵⁰⁶ Attorney General Eric Holder, responding to criticism of the Obama Administration's reliance on the privilege, has normalized state secrets in a different way: by providing clearer agency guidelines for determining when to invoke the privilege. These reforms were put in place in October 2009 and include substantive standards for invoking the privilege and a more formalized process that involves the head of the agency or department that seeks to sue for the privilege, the Attorney General, and a State Secrets Review Committee.⁵⁰⁷ Other authors have proposed additional reforms that would further normalize the privilege by introducing more structured decisionmaking by the agency.⁵⁰⁸ Although we take no position on the relative merits of these specific proposals, including whether they go far enough, all are administrative law-based reforms that would improve agency decisionmaking and diminish the role of foreign affairs exceptionalism in the invocation and application of the privilege.

CONCLUSION

Professor Henkin captured the prevailing wisdom of the twentieth century when he wrote in 1996 that “the Court has not said much

Agency Described by the President 7 (Jan. 19, 2006), <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf> [<http://perma.cc/8649-4QWC>].

⁵⁰⁴ See, e.g., Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1955 (2007).

⁵⁰⁵ Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3 §§ 1-16 (2012)).

⁵⁰⁶ Jared Cole, Note, *Historical Gloss and Congressional Power: Control over Access to National Security Secrets*, 99 VA. L. REV. 1855, 1870 (2013).

⁵⁰⁷ Memorandum from Eric Holder, Att’y Gen., U.S. Dep’t of Justice, to the Heads of Exec. Dep’ts & Agencies, Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), <http://www.justice.gov/opa/documents/state-secret-privileges.pdf> [<http://perma.cc/KK7D-2BGZ>].

⁵⁰⁸ Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1691 (2009) (“By making invocation of the privilege more administratively burdensome and by putting the professional credibility of officials who may not benefit from its use on the line, the reforms proposed here would more effectively discourage overreaching in the state secrets privilege context.”).

about foreign affairs and promises to say little more.”⁵⁰⁹ In the decades since the end of the Cold War, however, the Court has said a great deal about foreign affairs. Perhaps surprisingly, most of what it has said is that foreign relations law is not so exceptional after all. Scholars too have come to the same conclusion. To be sure, there are still outliers and there is still much unfinished business. But scholars and courts should embrace normalization as the new paradigm for foreign relations law. It is exceptionalism that is now exceptional.

⁵⁰⁹ HENKIN, *supra* note 103, at 4; *see also* H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529 (1999).