
THE ABIDING EXCEPTIONALISM OF FOREIGN RELATIONS DOCTRINE

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In their article *The Normalization of Foreign Relations Law*, Professors Ganesh Sitaraman and Ingrid Wuerth argue that “[foreign affairs] exceptionalism . . . is now exceptional,”¹ and that this is a good thing. I agree with much of the authors’ normative argument for “normalization” of foreign affairs doctrine (as they define the term). But the authors overstate the extent to which such normalization has already occurred. There have indeed been some recent Supreme Court decisions that seem to lack the exceptional deference to the Executive that had characterized judicial decisionmaking in the foreign affairs area in previous years. But foreign affairs doctrine remains resolutely exceptionalist in some areas beyond those identified by the authors as reflecting the “unfinished business” of normalization.² When these additional manifestations of exceptionalism are added to the ones the authors have identified, the claim that exceptionalism is now exceptional seems overstated.

I also question the authors’ apparent views about what a “normalized” foreign relations doctrine (as they define the term) would look like. The authors define normalization according to the baseline of proper constitutional interpretation.³ In other words, a distinct approach to foreign affairs issues does not count as exceptionalist if such distinct treatment is supported by the Constitution, properly construed. In defending their normalization thesis, however, the authors are not always faithful to their definition of the term. They take insufficient account of the possibility that some of the doctrines that they regard as exceptionalist merely reflect the distinct treatment that the Constitution contemplates for certain issues in the foreign relations area.

The authors note that “[s]ome scholars (generally liberals) like[] exceptionalism in the context of federalism, for example, but not when it [comes] to executive power. Others (generally conservatives) seem[]

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¹ Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1979 (2015).

² *Id.* at 1949.

³ See *infra* Part I, pp. 307–10. The authors apparently also exempt from the “exceptionalist” label differences that result from nonconstitutional legal analysis that is “generally applicable.” See *infra* Part I, pp. 307–10 (discussing *stare decisis*).

to take the opposite view.”⁴ But the scholars who have argued that the states have a more limited role and the executive branch a more expansive one in the foreign relations area than in the domestic area have based their arguments on the Constitution, not personal predilection. To the extent those constitutional arguments are valid, the resulting distinct treatment of foreign relations questions would not count as exceptionalist, as the authors define the term. Indeed, under the authors’ definition, a court would be acting in an exceptionalist manner if it were to treat such foreign affairs questions in the same way as domestic ones.

Since the authors’ distinction between exceptionalist and normal decisionmaking turns on a prior conclusion regarding the proper constitutional interpretation on a particular question, the argument that foreign affairs doctrine was once exceptionalist and has been normalized requires the resolution of some highly contested constitutional questions. It is not surprising that an article that covers as much ground as this one does does not engage in a deep constitutional analysis of each of the numerous constitutional doctrines it addresses. I do not fault the authors for not delving more deeply into such questions, but it is worth observing that the authors’ claims will not convince those who do not share the authors’ constitutional interpretations.

Part I of this Response discusses the authors’ definition of exceptionalism and normalization, which the authors describe as “an independent contribution” of the article, “regardless of whether one agrees with [its] broader normalization thesis.”⁵ As noted, their definition collapses the question of normalization with the proper interpretation of the Constitution. In defending their claim that foreign relations law was once exceptionalist and has become increasingly normalized, however, the authors seem to assume that recognizing a lesser role for the states in the foreign relations area, or greater discretion in the Executive, is generally exceptionalist. What is missing is a demonstration that the Constitution, properly construed, assigns the states the same role, and gives the Executive no broader role, with respect to foreign affairs than with respect to domestic affairs.

Part II challenges the authors’ characterization of some doctrines or decisions as exceptionalist. The authors cite *Missouri v. Holland*⁶ as an example of foreign relations exceptionalism.⁷ But the holding of *Missouri v. Holland* is supported by the constitutional text and is consistent with original intent and the case law preceding the decision.

⁴ Sitaraman & Wuerth, *supra* note 1, at 1920.

⁵ *Id.* at 1902.

⁶ 252 U.S. 416 (1920).

⁷ See *infra* Part II, pp. 311–15.

Likewise, the holding in *United States v. Belmont*⁸ is strongly supported by the constitutional text. Although some of the Court's reasoning in the case was admittedly exceptionalist, the Court offered a more normalized rationale for the outcome a few years later in *United States v. Pink*.⁹ Finally, the authors cite the Court's recent decisions invigorating the presumption against extraterritoriality as evidence of normalization because the Court rejected the Executive's proffered interpretations of the relevant statutes.¹⁰ But the presumption applied in these cases is itself exceptionalist in ways not recognized by the authors.

In some respects, the Constitution does fairly clearly provide for equivalent treatment of foreign and domestic affairs. Part III focuses on one such area: the judicial enforcement of treaties. As I have written at some length in these pages, the Supremacy Clause establishes that treaties are to be enforceable in the courts in the same circumstances as statutes.¹¹ Yet the courts have engrafted onto the Supremacy Clause a distinction between self-executing treaties and non-self-executing treaties, with only the latter being judicially enforceable.¹² Normalization of this doctrine would entail a narrow interpretation of the category of non-self-executing treaties. I have argued that the Supreme Court's decisions on this doctrine are consistent with a narrow, normalized approach,¹³ but the lower courts have adopted a broad understanding of the doctrine, and the Court's most recent decision, *Medellín v. Texas*,¹⁴ has been interpreted by many, including the authors, as endorsing a broad definition of non-self-executing treaties.¹⁵ If that interpretation is accepted, it would constitute a very significant example of exceptionalism in foreign relations doctrine, adding significantly to the authors' catalog of unfinished business.

I. NORMALIZATION DEFINED

As the authors define it, exceptionalism is "the belief that legal issues arising from foreign relations are functionally, doctrinally, and even methodologically distinct from those arising in domestic policy."¹⁶ But not all differences between the doctrines applied in the foreign and domestic contexts count as exceptionalist. "Excluded from [the

⁸ 301 U.S. 324 (1937).

⁹ 315 U.S. 203 (1942).

¹⁰ E.g., Sitaraman & Wuerth, *supra* note 1, at 1932.

¹¹ See generally Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

¹² See *Medellín v. Texas*, 552 U.S. 491, 505 (2008).

¹³ See Vázquez, *supra* note 11, at 649.

¹⁴ 552 U.S. 491.

¹⁵ See *infra* note 90 and accompanying text.

¹⁶ Sitaraman & Wuerth, *supra* note 1, at 1900.

authors'] definition [of exceptionalism] are distinctions between foreign and domestic powers that result from generally applicable formalist analysis based on, for example, constitutional text and original history."¹⁷ As an example, the authors point to the distinct procedures set forth in the Constitution for concluding treaties as opposed to enacting statutes.¹⁸ "If generally applicable analysis of text and original history allocates foreign affairs powers in particular ways, that allocation is still at the baseline"¹⁹ and is thus not an example of exceptionalism.

This is not the only available definition of exceptionalism, or the most intuitive. The authors could have distinguished between proper and improper exceptionalism. On this view, distinct approaches would always count as exceptionalist, but some exceptionalism would be proper because it would be justified through valid constitutional analysis, based, for example, on text and original history. The authors define exceptionalism more narrowly because, in their view, "[t]he 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."²⁰ In other words, exceptionalism is by definition inappropriate.

The authors appear to recognize only "formalist" constitutional argument as a proper — and hence not exceptionalist — basis for employing distinct approaches to resolving legal issues in the foreign and domestic spheres. Presumably this is not because functionalist constitutional argument is unknown in the domestic context, but because the authors reject functionalist arguments for distinctions between the foreign and domestic spheres on normative grounds (for the reasons set forth in Part III of the article). Even if one agrees with the authors' normative arguments for normalization, however, determining where the line falls between proper constitutional bases for distinct approaches and improper exceptionalism is not straightforward. Clearly, the authors would reject as improper exceptionalism distinct treatment based on the judge's belief that distinct treatment is desirable for functionalist reasons. Just as clearly, the authors would accept as proper non-exceptionalism distinct treatment required by the constitutional text, even if the text reflects the Founders' adherence to functionalist arguments of the sort the authors reject. For example, the authors reject the claim that greater limitations on state power are justified in the foreign context on the ground that "individual states can externalize the costs of violating international law, because retaliation for the

¹⁷ *Id.* at 1908.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

offense would be visited on the nation as a whole.”²¹ Yet the Founders relied on just this rationale in adopting certain constitutional provisions. Thus, Hamilton explained Article III’s grant of federal jurisdiction over certain foreign relations matters on the ground that “the Peace of the WHOLE ought not to be left at the disposal of a PART.”²²

Because the authors also consider constitutional argument based on “original history” to be a proper basis for concluding that different treatment is proper and thus not exceptionalist, presumably they would accept differences based on original intent but not memorialized in the constitutional text. If so, there would appear to be a plausible constitutional justification for some of the doctrines that the authors regard as exceptionalist, such as those based on the structural problems that Hamilton identified with leaving foreign relations matters in the hands of the states. A textualist would object to judicial recognition of doctrines not grounded in text even if supported by the Founders’ broad concerns about leaving foreign relations matters to the states.²³ But nontextual constitutional interpretation is hardly exceptional in the domestic context. The Court has recognized constitutional rights based on “penumbras, formed by emanations” from the constitutional text.²⁴ If such emanations are accepted in domestic decisionmaking, it seems difficult to dismiss as exceptionalist doctrines based on emanations from the Constitution’s allocation of numerous foreign relations powers to the federal government. From this perspective, the dormant foreign relations doctrine (criticized by the authors as exceptionalist²⁵) seems no more exceptionalist than the dormant commerce clause doctrine. This is not to say that textual and nontextual approaches are necessarily equally legitimate. A Justice or scholar can argue that both dormant doctrines are illegitimate. The point, rather, is that determining whether any particular doctrine is ex-

²¹ *Id.* at 1942 (citing 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)).

²² THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

²³ Notably, however, some textualists read very general constitutional texts, such as the Executive Power Vesting Clause, as allocating very extensive powers to the President with respect to foreign relations matters. See MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 5–6 (2007).

²⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The authors seem to recognize the prevalence of nontextual constitutional decisionmaking when they implicitly criticize as exceptionalist the Supreme Court’s refusal in *Missouri v. Holland* to recognize limits on the Treaty Power based on an “invisible radiation” from the Tenth Amendment, 252 U.S. 416, 434 (1920). See Sitaraman & Wuerth, *supra* note 1, at 1916 (noting that *Missouri v. Holland*’s reasoning was based on a sharp distinction between domestic and foreign affairs).

²⁵ See Sitaraman & Wuerth, *supra* note 1, at 1920–21.

ceptionalist, as the authors define the term, requires resolution of long-running debates about the proper way to interpret the Constitution.

The authors' acceptance of stare decisis as a proper (and thus not exceptionalist) ground of decisionmaking — "so long as it is applied the same way in domestic and foreign affairs cases"²⁶ — adds further complications. Stare decisis would justify adhering to otherwise exceptionalist doctrines and thus problematizes the authors' call for normalization. Indeed, I have argued that the dormant foreign affairs doctrine of *Zschernig v. Miller*²⁷ (criticized by the authors as exceptionalist²⁸) is entitled to the strong version of stare decisis applied to statutes as opposed to the weaker version applied to constitutional decisions.²⁹ This argument is based on generally applicable stare decisis principles, specifically, the fact that dormant foreign relations decisions, like dormant commerce clause decisions and decisions interpreting statutes, are revisable by Congress.³⁰ To the extent the dormant foreign relations doctrine is justified by generally applicable stare decisis principles, it would appear to be non-exceptionalist as the authors define the term. Additionally, it is possible that adherence to exceptionalist decisions on stare decisis grounds would justify additional exceptionalist decisions in related areas not just for reasons of doctrinal coherence, but also because a non-exceptionalist decision, when combined with the exceptionalist decision retained for stare decisis reasons, would leave us further from the constitutionally correct outcome than would an exceptionalist decision.³¹ If so, then the (otherwise) exceptionalist decision would qualify as non-exceptionalist as the authors define the term.

In sum, the authors' definition of exceptionalism exempts from that label any distinction justified by valid constitutional and even nonconstitutional arguments. A judge's reliance on her own belief that foreign relations cases are different would count as exceptionalist, but her reliance on *the Founders'* adherence to such beliefs would not necessarily. Adherence to exceptionalist decisions would not be exceptionalist if supported by generally applicable principles of stare decisis. Indeed, reversal of exceptionalist decisions would count as exceptionalist if based on departures from generally applicable stare decisis principles.

²⁶ *Id.* at 1908 n.32.

²⁷ 389 U.S. 429 (1968).

²⁸ See Sitaraman & Wuerth, *supra* note 1, at 1927.

²⁹ See Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1272 (2001).

³⁰ See *id.* at 1271–72.

³¹ For an example, see my discussion of *Medellín's* second holding in Part III, *infra*.

II. QUESTIONABLE CHARACTERIZATIONS

In light of the authors' acceptance of distinctions between foreign and domestic doctrines grounded in valid constitutional analysis (at least if "formalist"), some of their characterizations of doctrines as exceptionalist would appear not to deserve that label. Moreover, some of the developments that the authors claim as support for their normalization thesis would appear to be exceptionalist in respects the authors do not seem to recognize.

In their narrative of the rise of exceptionalism, the authors devote a paragraph to Court's holding in *Missouri v. Holland*.³² Although the authors hedge in their characterization of the decision as exceptionalist,³³ they conclude their discussion of the case with the claim that this "famously opaque" decision "seemed to rest [partly on] exceptionalist grounds."³⁴ In my view, the Court's holding and analysis were well grounded in text and original history and hence not exceptionalist.

As described by the authors, the Court in *Missouri v. Holland* held that "the federal government has broader power acting pursuant to the Treaty Power than it does pursuant to the Commerce Clause," and, "arguably," "that Tenth Amendment limitations do not apply to the Treaty Power."³⁵ But the conclusion that the limitations of the Commerce Clause do not apply to the Treaty Power is amply supported by the constitutional text, which in Article II confers the Treaty Power on the President ("with the Advice and Consent of the Senate"),³⁶ without linking it in any way to the Commerce Power conferred on Congress in Article I.³⁷ Even if the Treaty Power had been placed in Article I, there would be no greater reason to conclude that the limits of the Commerce Power apply to it than to conclude that the limits of the power to raise and support armies or to create a post office apply to the Commerce Power. It is, indeed, the claim that the limits of the Commerce Power apply to the Treaty Power that conflicts with the constitutional text. As for the Tenth Amendment, the Court merely noted, uncontroversially, that its reservation to the states of the powers not delegated to the federal government was beside the point, since Article II delegates the Treaty Power to the federal government.³⁸ The

³² See Sitaraman & Wuerth, *supra* note 1, at 1916–17.

³³ See *id.* at 1916 (stating that *Missouri v. Holland* "arguably contributed to the rise of foreign relations exceptionalism"); *id.* at 1928 n.173 (stating that *Missouri v. Holland* was "arguably an exceptionalist opinion").

³⁴ *Id.* at 1917.

³⁵ *Id.* at 1916.

³⁶ See U.S. CONST., art. II, § 2, cl. 2.

³⁷ See *id.*

³⁸ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

Court's refusal to find that the treaty was "forbidden by some invisible radiation from the general terms of the Tenth Amendment"³⁹ might be regarded as exceptional if the Court had found such radiations in the domestic context, but the Court's *Lochner*-era decisions were based on a narrow interpretation of the Commerce Clause rather than on emanations from the Tenth Amendment.⁴⁰ The authors claim that the Court's reasoning "was premised on a sharp distinction between domestic and foreign affairs,"⁴¹ and cite as exceptionalist the Court's statement that the limits of the Treaty Power "must be ascertained in a different way."⁴² But the different texts require different approaches to ascertaining the limits of the two clauses. And, of course, determining the scope of the Treaty Power requires consideration of the purpose and nature of a treaty as an instrument of international relations.⁴³ The Court's holding and analysis in *Missouri v. Holland* was no more exceptionalist than the authors' acceptance of the different methods of concluding treaties and statutes.⁴⁴

Also defensible on the basis of constitutional text is the decision in *United States v. Belmont*,⁴⁵ which also plays a prominent role in the authors' narrative of the rise of exceptionalism.⁴⁶ The Court in *Belmont* upheld and gave preemptive effect to the Litvinov Assignment, a sole executive agreement.⁴⁷ Justice Sutherland's rationale for upholding the Assignment was indeed very broad, relying on his *Curtiss-Wright* theory that all state lines disappear with respect to ex-

³⁹ *Id.* at 434.

⁴⁰ See generally *Lochner v. New York*, 198 U.S. 45 (1905). Even if the domestic cases had rested on "radiations" from the Tenth Amendment, the fact that these radiations came subsequently to be rejected as mistaken would arguably justify at least a retroactive acceptance of *Holland* as proper non-exceptionalism. More generally, to the extent a current domestic doctrine is misguided, it might well be preferable to find the doctrine inapplicable in the foreign relations context than to extend the misguided doctrine to foreign relations cases. With respect to modern Tenth and Eleventh Amendment doctrines, I have expressed the view that it would be better to apply the misguided doctrines and seek their reversal in both contexts. See Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317 (1999); Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713 (2002). But I see the appeal of the contrary view.

⁴¹ Sitaraman & Wuerth, *supra* note 1, at 1916.

⁴² *Id.* at 1917 n.81 (quoting *Missouri v. Holland*, 252 U.S. at 433) (internal quotation marks omitted).

⁴³ This is presumably the part of the opinion that the authors believe relied upon a "sharp distinction" between foreign and domestic affairs.

⁴⁴ The authors write that "[t]he historical foundations of *Missouri v. Holland* are contested." *Id.* at 1916 n.80. My own research has led me to agree with the scholars cited by the authors as supporting the decision's consistency with prior history. See Carlos Manuel Vázquez, *Missouri v. Holland's Second Holding*, 73 MO. L. REV. 939 (2008).

⁴⁵ 301 U.S. 324 (1937).

⁴⁶ See Sitaraman & Wuerth, *supra* note 1, at 1915-16.

⁴⁷ *Belmont*, 301 U.S. at 332.

ternal affairs.⁴⁸ But shortly thereafter the Court offered a narrower justification for upholding the Assignment in *United States v. Pink*.⁴⁹ Justice Douglas's opinion for the Court in that case stressed the fact that the Assignment was part of a broader package that resulted in the United States' recognition of the Soviet Union.⁵⁰ The Executive's exclusive power to recognize foreign nations and their governments has textual support in Article II's allocation to the President of the power to send and receive ambassadors.⁵¹ The Court in *Pink* tied the validity of the sole executive agreement in that case to its connection with recognition.⁵² The settlement of claims of American citizens against the Soviet Union was an obstacle to recognition of the Soviet Union, and the assignment to the United States of Russian claims against Americans was part of a package to compensate U.S. citizens and thus remove this obstacle. "Power to remove such obstacles to full recognition as settlement of claims of our nationals," the Court wrote, "certainly is a modest implied power of the President."⁵³ Later extensions in *Dames & Moore*⁵⁴ and *Garamendi*⁵⁵ certainly took executive power further, but the holdings of *Belmont* and *Pink*, if not all of the language in the opinions, were well founded in generally applicable constitutional doctrine.

The authors' definition of exceptionalism also gives rise to the possibility that the very same doctrinal development might be an example of normalization along one dimension but an example of exceptionalization along another. Some of the Roberts Court decisions that the authors cite in support of their normalization thesis appear to be exceptionalist along dimensions not discussed by the authors. The authors identify three main categories of exceptionalist doctrine: "non-justiciability, 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."⁵⁶ Their examples of normalization fall overwhelmingly in the third category. Many involve the Court's rejection of interpretations of treaties or statutes proffered by the executive branch. Among the latter, the authors cite *Morrison*⁵⁷

⁴⁸ *Id.* at 331 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936)).

⁴⁹ 315 U.S. 203 (1942).

⁵⁰ *See id.* at 211–13.

⁵¹ U.S. CONST. art. II, § 3.

⁵² *E.g.*, 315 U.S. at 227.

⁵³ *Id.* at 220.

⁵⁴ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁵⁵ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

⁵⁶ Sitaraman & Wuerth, *supra* note 1, at 1902.

⁵⁷ *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

and *Kiobel*,⁵⁸ which held that the presumption against extraterritoriality applies to section 10(b) of the Securities Exchange Act⁵⁹ and to the federal common law cause of action recognized in *Sosa v. Alvarez-Machain*,⁶⁰ respectively.⁶¹

While these decisions may reflect normalization insofar as they rejected the interpretations of the statutes proposed by the executive branch, the Court's invigoration of the presumption against extraterritoriality in these cases is exceptionalist from the nonjusticiability perspective, as it removes discretion from the courts in order to safeguard the nation's foreign relations interests. As the Court has explained, this presumption guards against unintended clashes with the laws of other nations.⁶² But this purpose could have been served by other approaches to statutory interpretation. For example, with respect to the antitrust laws, the lower courts had developed and applied a jurisdictional rule of reason, which sought to ascertain the likelihood of clashes with the laws of other states on a case-by-case basis.⁶³ Justice Scalia favored this approach in his dissent in the *Hartford Fire* case.⁶⁴ With respect to Alien Tort Statute cases, Justice Breyer's concurrence in *Kiobel* similarly favored a more fine-grained analysis of federal interests in the international sphere.⁶⁵ The Court's rejection of this approach in favor of a strong presumption against extraterritoriality is apparently based on its view that the assessment of the foreign relations consequences of applying federal law extraterritorially is not a suitable task for the judiciary. The Court instead adopted an approach that overprotects the interest in avoiding offense to foreign sovereigns. The Court sought to achieve this goal, moreover, by disabling the courts from employing ordinary means of statutory interpretation, such as by, apparently, precluding resort to legislative history.⁶⁶

⁵⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

⁵⁹ *Morrison*, 130 S. Ct. at 2883.

⁶⁰ 542 U.S. 692 (2004).

⁶¹ The authors describe *Kiobel* as applying the presumption against extraterritoriality to the Alien Tort Statute, 28 U.S.C. § 1350 (2012). See Sitaraman & Wuerth, *supra* note 1, at 1932. That the Court in fact applied the presumption to the federal common law cause of action recognized in *Sosa*, rather than to the Alien Tort Statute qua jurisdictional statute, is explained in Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on Kiobel v. Royal Dutch Petroleum*, 89 NOTRE DAME L. REV. 1719, 1730 (2014).

⁶² See *Kiobel*, 133 S. Ct. at 1664.

⁶³ See, e.g., *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 613-15 (9th Cir. 1976), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, § 402, 96 Stat. 1233, 1246 (codified at 15 U.S.C. § 6a (2012)).

⁶⁴ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

⁶⁵ *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

⁶⁶ Thus, in *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991), which the Court in *Morrison* relied upon, see e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010), Justice Marshall noted that the House Report made it clear that the statute was intended to apply to discrimination by U.S. employers against U.S. employees employed abroad. *Aramco*, 499 U.S.

The Court's adoption of a method of statutory interpretation that overprotects the federal interest in avoiding international friction and precludes resort to ordinary means of ascertaining statutory meaning, grounded on its distrust of the courts' ability to assess the likelihood of such friction in individual cases, is decidedly exceptionalist with respect to justiciability.

The authors appear to recognize that *Morrison* and *Kiobel* diminish the authority of the courts, but they claim that "[t]he result has been to further shift power toward Congress at the expense of the executive."⁶⁷ In fact, the presumption against extraterritoriality diminishes Congress's role by requiring courts to disregard probative evidence of its intent, imposing a requirement of clarity beyond what is necessary for statutes not touching on foreign affairs. Nor does the presumption against extraterritoriality, when compared to other available approaches, necessarily diminish the role of the Executive. Contrary to the authors' claim that "a case-by-case approach . . . would afford more control to the executive branch,"⁶⁸ a case-by-case approach need not incorporate deference to the Executive. The presumption against extraterritoriality seems based more on distrust of the courts than a desire to limit the role of the Executive.⁶⁹

III. MEDELLÍN'S EXCEPTIONALISM

There are, to be sure, a number of respects in which the Constitution contemplates that foreign and domestic affairs will be treated similarly. I agree with the authors' contention that the Court's broad application of nonjusticiability doctrines and the exceptionally broad deference it has often given to the Executive's views in certain foreign relations cases qualify as exceptionalist. Normalization of some of these doctrines is desirable for the reasons given by the authors. But I am not as sure as the authors that the cases they discuss reflect the Court's commitment to normalizing foreign relations law. The data

at 268 (1991) (Marshall, J., dissenting). Justice Rehnquist's majority opinion ignored this evidence of legislative intent in construing the statute's alien exemption. *Morrison* may represent a retreat from *Aramco* insofar as the Court recognized that the presumption against extraterritoriality is not a clear statement rule and acknowledged that "context" may be consulted. *Morrison*, 130 S. Ct. at 2883. But the Court recognized the relevance of context only to "give the most faithful reading" of the text, and it again declined to consider legislative history. *Id.* (quoting *id.* at 2892 (Stevens, J., concurring in the judgment)) (internal quotation marks omitted); *cf. id.* at 2892 (Stevens, J., concurring in the judgment) ("[E]vidence [of legislative intent] legitimately encompasses more than the enacted text.").

⁶⁷ Sitaraman & Wuerth, *supra* note 1, at 1933.

⁶⁸ *Id.* at 1932.

⁶⁹ *Cf.* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015) (arguing that the Roberts Court's foreign relations decisions reflect distrust of lower courts as well as of the executive and legislative branches).

points are relatively few, and they may reflect ad hoc coalitions around particular results in the relevant cases. Moreover, there are counterexamples that the authors do not consider. Most significantly, the authors do not discuss what I regard as perhaps the most important doctrine in need of normalization — the doctrine of non-self-executing treaties. The recent decision in *Medellín v. Texas*,⁷⁰ as the authors interpret it, reflects a giant step in the direction of exceptionalism.⁷¹ When added to the cases identified by the authors as reflecting the unfinished business of normalization, *Medellín* suggests that the Court may be rejecting exceptionalism only selectively and opportunistically. The Court's failure to review numerous exceptionalist lower court decisions lends support to this alternative thesis.⁷²

The Supremacy Clause provides a clear textual indication of the Founders' intent to "normalize" treaty enforcement doctrine. Before the Constitution was adopted, the United States adhered to the British rule, under which treaties were not judicially enforceable until incorporated into domestic law by statute.⁷³ The Supremacy Clause reflects the Founders' intent to reject the British rule and dispense with the need for treaties to be implemented by statute. The clause declares "all Treaties" to be the "supreme Law of the Land,"⁷⁴ along with federal statutes and the Constitution itself, and instructs judges to give ef-

⁷⁰ 552 U.S. 491 (2008).

⁷¹ The authors acknowledge in a footnote that I have argued that a broad understanding of the doctrine of non-self-executing treaties "does not comport with constitutional text and history (and therefore could be characterized as exceptionalist)." Sitaraman & Wuerth, *supra* note 1, at 1929 n.186. But I am hardly alone in so viewing this doctrine. See, e.g., Martin S. Flaherty, Response, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1488–89 (2006); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 760–64 (1988); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1469–73 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005)); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 7 (2002); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 907–17 (2004); cf. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1928 (2005) ("[S]elf-executing treaties are the paradigm, and non-self-executing treaties — though very much in the ascendancy today — were meant to be the exception rather than the rule."). But see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, Rejoinder, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999).

⁷² See generally Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322 (2015) ("[T]here are dozens of other examples of foreign relations exceptionalism in recent lower court decisions [that] have been wholly undisturbed by the Supreme Court." *Id.* at 322 (emphasis omitted)).

⁷³ See Carlos Manuel Vázquez, Response, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2158–59 (1999); see also Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 698–99 (1995) [hereinafter Vázquez, *Four Doctrines*].

⁷⁴ See U.S. CONST. art. VI, cl. 2.

fect to all three forms of federal law.⁷⁵ This text strongly supports the conclusion that treaties should be enforceable in domestic courts in the same circumstances as federal statutes and constitutional provisions are.⁷⁶ Yet, in *Foster v. Neilson*,⁷⁷ the Court in 1829 ruled that some treaties require implementing legislation — a category that has since become known as non-self-executing treaties.⁷⁸ The doctrine of non-self-executing treaties has been accurately described as among “the most confounding in treaty law.”⁷⁹

The Court subsequently reversed its holding that the treaty involved in *Foster* was non-self-executing,⁸⁰ and it largely ignored the doctrine for most of the following two centuries, applying treaties as law in numerous cases without pausing to consider whether they were self-executing.⁸¹ In the latter half of the twentieth century, however, the lower courts began applying the doctrine vigorously in what can only be described as an exceptionalist manner. Indeed, it was frequently said during this period that non-self-executing treaties lacked the force of domestic law.⁸² Some courts held that treaties were self-executing, and hence judicially enforceable, only if they disclosed an intent that they should have the force of domestic law.⁸³ The incompatibility of these statements with the clear text of the Constitution, which declares that “all Treaties” have the force of domestic law, shows the highly exceptionalist nature of this doctrine. As applied by these courts, the doctrine sharply distinguishes the standards for enforcing treaties from those applicable to the enforcement of statutes, despite the clear constitutional text indicating that both are the “supreme Law of the Land” to be enforced by judges. After all, we do not say that federal statutes have the force of domestic law only if they disclose an intent that they have such force.

In prior work, I have attempted to reconcile the doctrine of non-self-executing treaties with the Supremacy Clause’s text.⁸⁴ I have identified four types of reasons why a treaty might not be judicially enforceable even though it is the supreme law of the land. The four types of reasons correspond to reasons why analogous federal statutes

⁷⁵ See *id.*

⁷⁶ See Paul B. Stephan, *Private Remedies for Treaty Violations After Sanchez-Llamas*, 11 LEWIS & CLARK L. REV. 65, 86 (2007); Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 577–78 (2007). See generally Vázquez, *supra* note 11, at 611–28.

⁷⁷ 27 U.S. (2 Pet.) 253 (1829).

⁷⁸ See *id.* at 314.

⁷⁹ *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979).

⁸⁰ *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833).

⁸¹ See Vázquez, *Four Doctrines*, *supra* note 73, at 716 & n.99.

⁸² See *id.* at 703 & n.37.

⁸³ See, e.g., *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

⁸⁴ See Vázquez, *supra* note 11; Vázquez, *Four Doctrines*, *supra* note 73.

would not be judicially enforceable. In other words, I have argued for a normalization of the doctrine of non-self-executing treaties. In particular, I have argued that, to the extent the self-execution issue turns on intent, the court should conclude that the treaty is judicially enforceable unless it states clearly that its provisions are subject to legislative implementation.

The Court in *Medellín* recently had an opportunity to normalize the doctrine of non-self-executing treaties, but it is fair to say that it did not do so. The issue was whether the Texas courts were required to comply with a judgment of the International Court of Justice (ICJ).⁸⁵ Despite a treaty provision stating that the parties “undertake[] to comply” with the judgments of the ICJ,⁸⁶ the Court found no domestic-law obligation to comply with the judgments of the ICJ.⁸⁷ Much of the Court’s analysis was distinctly exceptionalist. The clear text of the Supremacy Clause would appear to require the conclusion that our undertaking to comply with the ICJ’s judgments has the force of domestic law. But the Court completely ignored the constitutional text — a notably exceptionalist approach to constitutional interpretation that contrasts sharply with the Court’s approach to deciding constitutional issues that very Term in cases such as *District of Columbia v. Heller*.⁸⁸ In clarifying what it meant by a non-self-executing treaty, the Court wrote:

What we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.⁸⁹

Since the Supremacy Clause itself gives “all Treaties” automatic effect as federal law upon ratification, the Court’s very definition of the concept of non-self-execution was strikingly exceptionalist. In finding the treaty to be non-self-executing, the Court cited with approval some of the exceptionalist lower court decisions mentioned above,⁹⁰ leading some courts and commentators to conclude that the Court had established a strong presumption against self-execution, rebuttable only by clear evidence that the treaty was intended to have the force of domes-

⁸⁵ See *Medellín v. Texas*, 552 U.S. 491, 498 (2008).

⁸⁶ *Id.* at 508.

⁸⁷ *Id.* at 509.

⁸⁸ 554 U.S. 570 (2008).

⁸⁹ *Medellín*, 552 U.S. at 505 n.2.

⁹⁰ See *id.* at 505 (“[W]hile treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be “self-executing” and is ratified on these terms.’” (omission in original) (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))).

tic law.⁹¹ As already noted, in enforcing statutes, we do not ask whether Congress intended that the statute have the force of domestic law.

The proper interpretation of *Medellín* is uncertain, as the Court gave a number of reasons, not all consistent with each other, for finding the treaty involved in that case to be non-self-executing.⁹² Most scholars agree that much of the Court's exceptionalist analysis cannot be taken seriously.⁹³ I have argued that some of the Court's analysis is consistent with a narrow, normalized version of the doctrine of non-self-execution. Specifically, I have argued that the Court understood the term "undertakes" to mean something other than "shall" or "must" comply, and thus concluded that the treaty did not in fact impose an absolute obligation to comply with ICJ judgments.⁹⁴ The Court appeared to understand the treaty to impose instead an obligation to use best efforts to comply. If so, the Court's interpretation of the treaty was erroneous, but its conclusion that such a treaty was non-self-executing was not.⁹⁵

Whether a normalized interpretation of *Medellín* will be widely adopted remains to be seen. But I note that the authors do not embrace it, as they describe *Medellín* as finding the treaty to be non-self-executing even though the Court viewed "the ICJ judgment [as] binding on the United States as a matter of international law."⁹⁶ If the authors are right, then *Medellín*'s approach to non-self-executing treaties stands as a huge counterexample to their thesis that the trend during the Roberts Court has been towards normalization of foreign relations doctrine. Indeed, unless normalized as I suggest, *Medellín*'s approach to the judicial enforcement of one of the three categories of federal law identified in the Supremacy Clause would appear to be an enormous step by the Roberts Court in the direction of exceptionalism.

The authors cite *Medellín* as exemplifying normalization of foreign relations law in two respects. First, they argue that the Court's rejection of the dissent's "arrestingly indeterminate" approach to the self-

⁹¹ See, e.g., *Mora v. New York*, 524 F.3d 183, 202 (2d Cir. 2008) (stating that *Medellín* "adopt[ed] a clear-statement rule for determining when treaties are self-executing").

⁹² See Vázquez, *supra* note 11, at 652–65.

⁹³ See, e.g., Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541 (2008) (arguing that, despite the Court's language quoted above, the Court must have meant that non-self-executing treaties do have the force of domestic law but are merely not judicially enforceable). Even Ted Cruz, who argued the case on behalf of Texas, concedes that non-self-executing treaties have the force of domestic law. See *Medellín v. Texas - Part I: Self-Execution*, FEDERALIST SOC'Y (Mar. 28, 2008), <http://www.fed-soc.org/publications/detail/medellin-v-texas-part-i-self-execution> [<http://perma.cc/33C4-KGGE>] (remarks of Sen. R. Ted Cruz).

⁹⁴ Vázquez, *supra* note 11, at 660–62.

⁹⁵ *Id.* at 663–65.

⁹⁶ Sitaraman & Wuerth, *supra* note 1, at 1929.

execution enhanced the power of Congress while diminishing that of the Executive.⁹⁷ But it is unclear why enhancing the power of Congress counts as normalization (particularly when the constitutional text was intended to dispense with the need for legislative implementation). Moreover, as discussed above, an indeterminate approach need not incorporate deference to the Executive. Indeed, the Court's unwillingness to trust the courts with a case-by-case assessment appears to be in tension with the authors' recognition that nonjusticiability doctrines count as exceptionalist. In any event, the Court could have normalized self-execution doctrine along the dimensions the authors discuss by adopting a "bright-line" presumption that treaties are self-executing. Such a holding would have had the additional benefit of being in accord with a generally applicable formalist approach to constitutional interpretation.

The authors also count as an example of normalization the Court's refusal in *Medellín* to give effect to the President's memorandum instructing the state courts to comply with the ICJ's judgment.⁹⁸ While this holding does diminish the role of the Executive, I would argue that upholding the President's power to order compliance would have been the less exceptionalist holding. After all, there was a treaty in force by which the United States undertook to comply with the judgments of the ICJ. The only reason the Court had to reach the question of the validity of the President's memorandum was because of its highly exceptionalist decision finding that treaty to be non-self-executing.⁹⁹ In light of its exceptionalist approach to self-execution, the Court's acceptance of a presidential power to require compliance with a non-self-executing treaty would have resulted in a less exceptionalist outcome overall than rejection of such a power. The normalized outcome would have been direct enforcement of the treaty provision requiring compliance with the ICJ judgment. The Court's exceptionalist ruling on non-self-execution combined with an acceptance of a presidential power to require compliance would have come closer to that normalized outcome than its exceptionalist ruling on non-self-execution combined with its rejection of such a presidential power. Under the first alternative, compliance turns on the President's consent, which is closer to the normalized outcome than the second alternative, which requires the consent of the President *plus* a majority of both Houses of Congress. To be sure, adjusting the powers of one branch to compensate for a shift in doctrine in a related area is not a conventional or

⁹⁷ *Id.* at 1933 (citing *Medellín v. Texas*, 552 U.S. 491, 515 (2008)).

⁹⁸ *Id.* at 1931–32.

⁹⁹ I am assuming here that my normalized reading of *Medellín* is not adopted.

widely used approach to constitutional interpretation, but it is a defensible generally applicable approach.¹⁰⁰

Even if the part of *Medellín* rejecting the President's memorandum were considered separately from the Court's exceptionalist non-self-execution holding, I doubt that it reflects a move by the Roberts Court towards normalization of foreign relations doctrine. As the authors note, the Court relied primarily on the notion that the existence of a non-self-executing treaty placed the case in the third *Youngstown* category,¹⁰¹ meaning that the President would have had greater power to require compliance if there had been no treaty undertaking to comply with ICJ judgments.¹⁰² This reasoning is not just "weak," as the authors acknowledge,¹⁰³ but absurd.¹⁰⁴ Still, it is what the Court said.¹⁰⁵ To the extent the Court relied on this reasoning, *Medellín* does not tell us anything about the President's power to require compliance with ICJ judgments, or take other action on his own authority, in the absence of a non-self-executing treaty.

IV. CONCLUSION

Professors Sitaraman and Wuerth make a strong case that normalization of foreign relations law would be desirable in many contexts and that the Court has made some moves in this direction. However, their characterization of certain foreign relations doctrines as exceptionalist is subject to question under their own definition of exceptionalism. Moreover, they have overlooked an important doctrine in dire need of normalization that the Roberts Court has taken in an exceptionalist direction. Adding the Court's exceptional treatment of this doctrine to the list of other doctrines that the authors acknowledge remain to be normalized calls into question the authors' conclusion that exceptionalism has become exceptional.

¹⁰⁰ For a suggested application of this approach in the domestic context, see Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1636 (2008). See also William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540–43 (1992); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 179–95 (1994); Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 SUP. CT. REV. 125, 213; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 439–42 (1995).

¹⁰¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

¹⁰² Sitaraman & Wuerth, *supra* note 1, at 1931.

¹⁰³ *Id.*

¹⁰⁴ See Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM J. INT'L L. 563 (2008).

¹⁰⁵ See *Medellín v. Texas*, 552 U.S. 491, 527 (2008).